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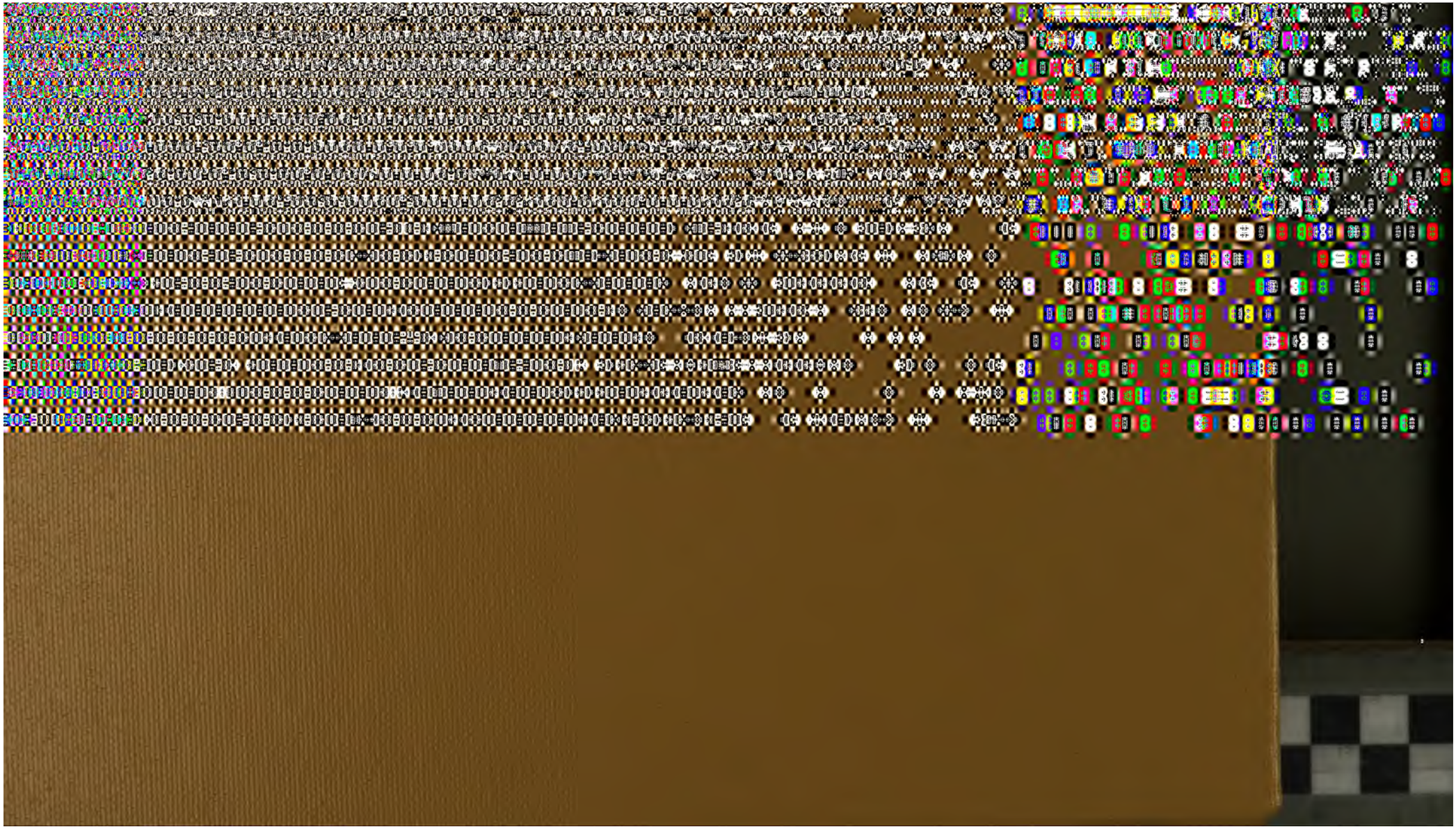
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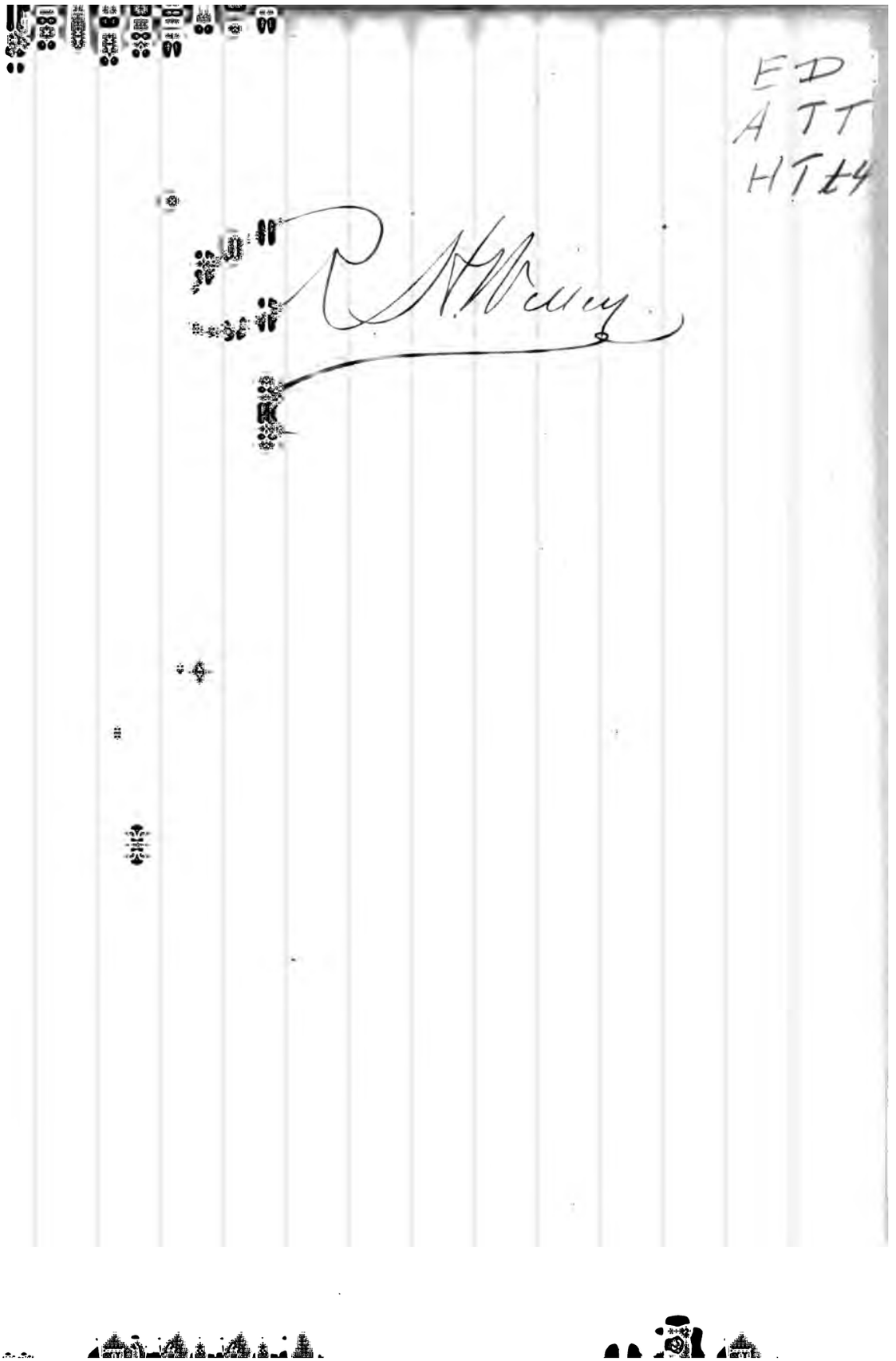
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A TREATISE

ON THE WRONGS CALLED

SLANDER AND LIBEL,

AND ON THE

REMEDY BY CIVIL ACTION FOR THOSE WRONGS,

TOGETHER WITH A CHAPTER ON

MALICIOUS PROSECUTION.

By JOHN TOWNSHEND.

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PREFACE TO THE FOURTH EDITION.

Burdened with many other duties, it was with extreme reluctance that I consented to prepare a Fourth Edition of this work. After accepting the task, at a sacrifice of time that might have been, to me, more profitably employed, I made an honest endeavor to produce a result creditable to the author and acceptable to the reader. How far the attempt has been successful my profession will judge.

My labor has been materially lightened by the aid of MR. JAMES B. CLARK, of the New York Bar, and I am at loss how adequately to acknowledge my obligation for his valuable assistance.

JOHN TOWNSHEND.

BENNETT BUILDING,
New York, January, 1890.

PREFACE TO THE THIRD EDITION.

In introducing a third edition of the following essay, I desire to return my unfeigned thanks for the many flattering notices of previous editions. One kind friend expressed regret that so much labor had been bestowed in the endeavor to treat scientifically a subject which does not admit of scientific treatment, and another described my text as not so much an exposition of the law as it is, as of the law as it probably will be. In reference to these remarks, I hope and believe my labor has not been altogether fruitless, and the care taken in every instance to distinguish my suggestion from the received rule of law will prevent the reader confounding the one with the other. It is gratifying to me to find that many of my suggestions have been legitimized by judicial sanction.

I disclaim innovation; my aim has been to elicit the true rule of decision on some leading points in the law of libel, and present them with more distinctness than had been theretofore attempted. Thus, among other things, I have endeavored to demonstrate:

I. The gist of an action for slander or libel is the pecuniary injury.

II. The *malice* necessary to maintain an action for slander or libel is only the absence of a legal excuse for making the publication.

III. The phrases *malice in fact* and *malice in law* do not mean different kinds of malice, but describe only different kinds of proof.

IV. The existence of a distinction between language concerning a person and language concerning a thing, and in what the distinction consists.

V. "Slander of title," so called, is within the class of language concerning a thing.

VI. The right to give what is termed "a character to a servant" does not arise out of any relation of master and servant, but out of the general right to communicate one's belief, in a *bona fide* desire to protect one's own or another's rights.

VII. The right of "criticism" is within the class of language concerning a thing.

VIII. Malicious prosecution is the publication of defamatory language in a court of justice.

The present edition differs from the preceding in containing several hundred additional references to decisions in the American, English, Irish, Scotch, Canadian and Australian reports, and also in the addition of a chapter upon "Malicious Prosecution."

The numbering of the sections corresponds with previous editions.

A strenuous effort has been made to secure accuracy in the citation of authorities, and, while it is known that many errors have occurred, it is believed that more than ordinary correctness has been attained.

The references to Holt on Libel are to the American edition, and, as the third edition of Starkie on Slander, by Folkard, has not been reproduced in this country, the references to Starkie on Slander are to the second American edition by Wendell.

JOHN TOWNSHEND.

BENNETT BUILDING,
New York, July, 1877.

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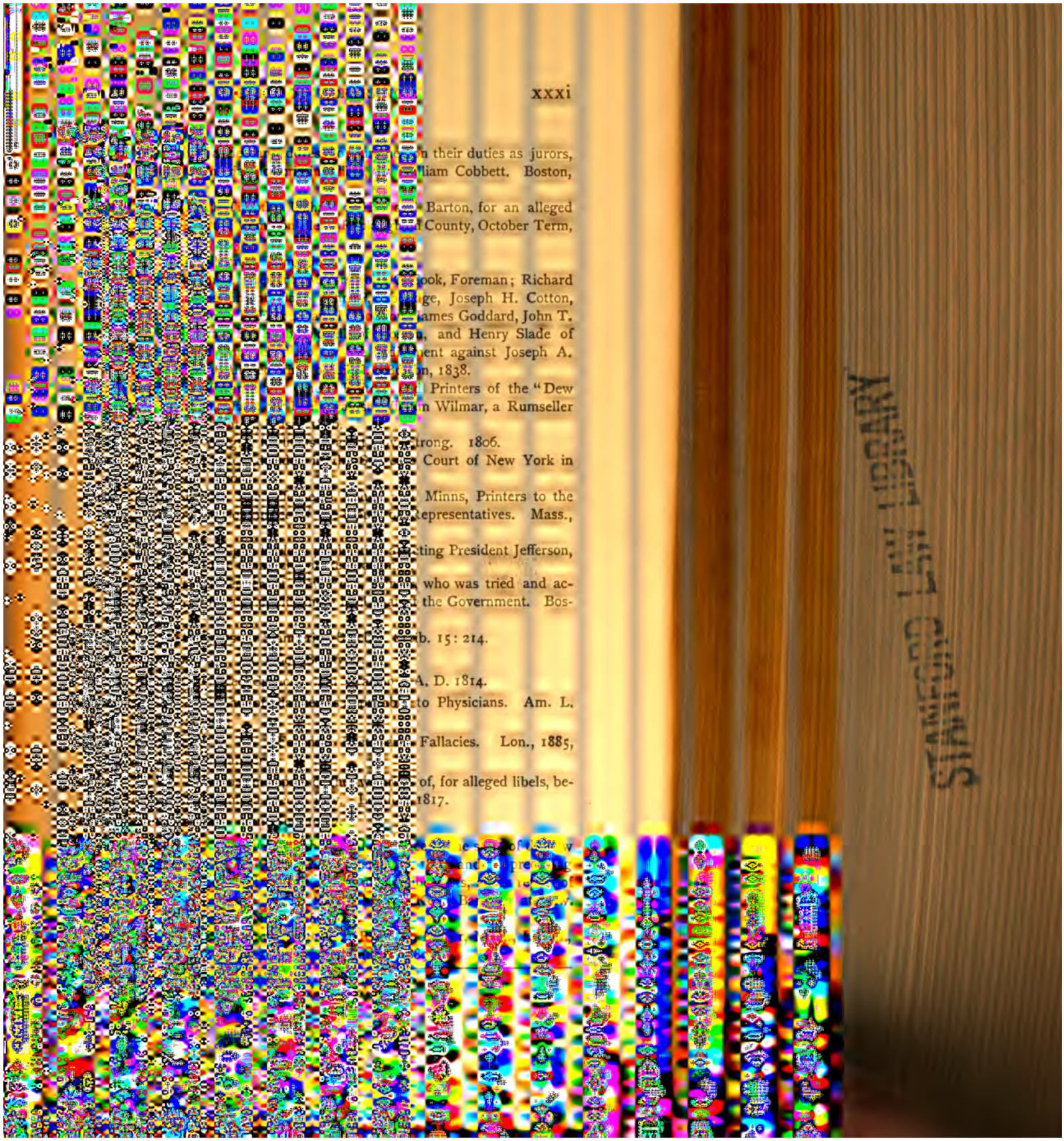
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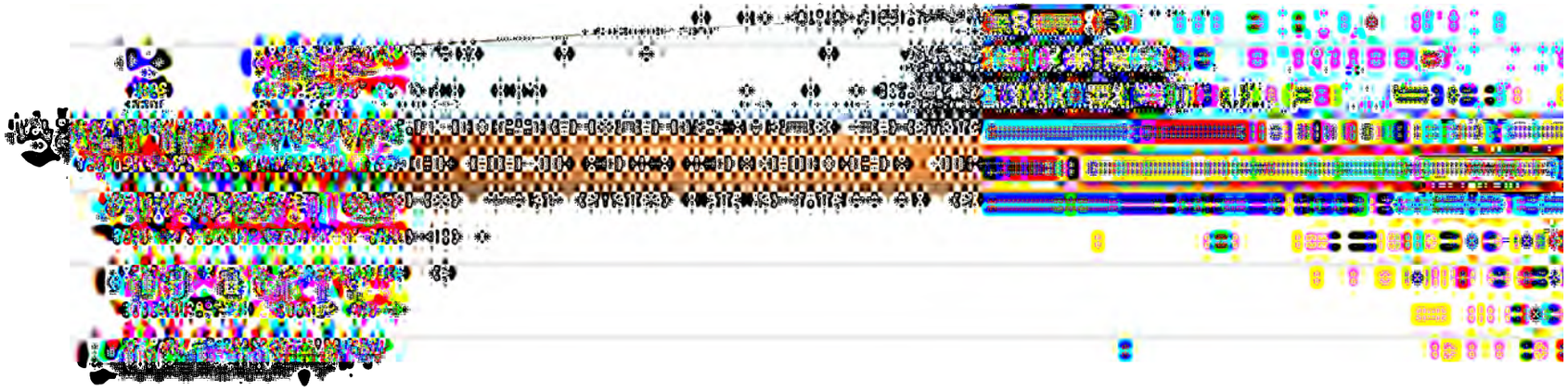
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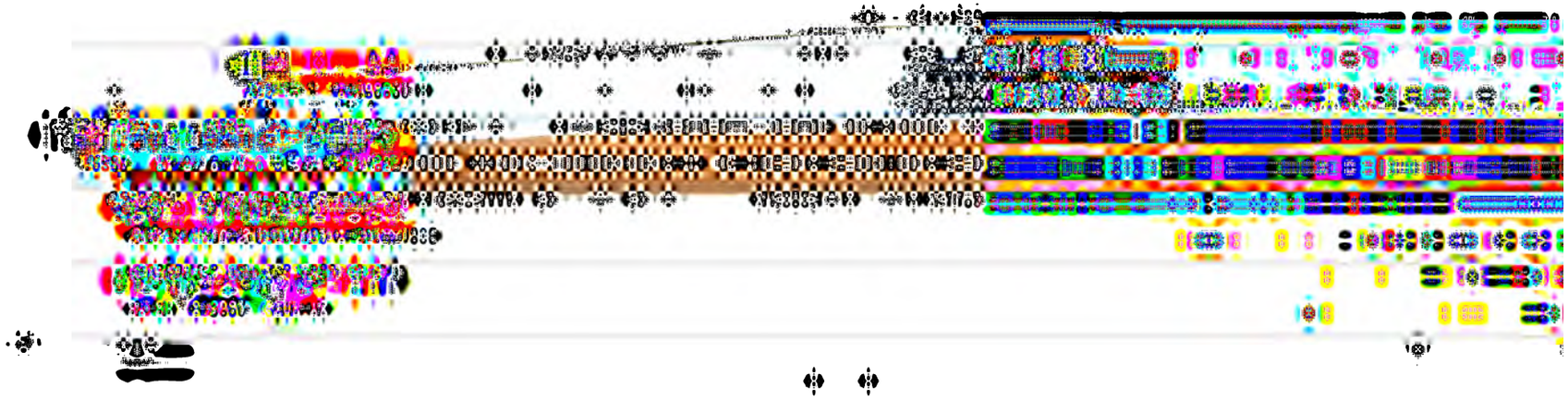


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ABBREVIATIONS AND THEIR MEANINGS.

Abb. N. C.—Abbott's New Cases (New York).
Abb. Pr. R.: Abb. Pra. R.—Abbott's Practice Reports (New York).
Abb. Pr. R., N. S.—Same, New Series.
Add.—Addams' Ecclesiastical Reports.
Addison's R.—Addison's Reports (Pennsylvania).
A. & E.: Ad. & El.: Ad. & Ell.: Adol. & El.: Adol. & Ell.—Adolphus and Ellis' Reports, King's Bench.
Ad. & El., N. S.: Ad. & Ell., N. S.—Same, New Series.
Aik.—Aiken's Reports (Vermont).
A. J. R.: Aust. Jur. Rep.—Australian Jurist Report.
Ala.—Alabama Reports.
Ala. O. S.—Alabama Reports, Old Series.
Alb. L. J.—Albany (N. Y.) Law Journal.
Aleyn—Aleyn's Reports, King's Bench.
All.: Allan—Allan's Reports, New Brunswick.
Alle —Allen's Reports (Massachusetts).
Am. Dec.—American Decisions, U. S.
Amer. Law J., N. S.—American Law Journal, New Series.
Amer. Lead. Cas.—American Leading Cases.
Amer. Law Record—American Law Record (Ohio).
Amer. Quarterly Rev.—American Quarterly Review.
Amer. Rep.—American Reports.
And.: Andr.—Andrews' King's Bench Reports.
Anst.—Anstruther's Exchequer Reports.
Anthon—Nisi Prius Reports (New York).
App.—Appleton's Reports (Maine).
App. C.: App. Cas.—Law Reports; Appeal Cases (England).
Ark.—Arkansas Reports.
Arm., Mac. & Og.—Armstrong, Macartney and Ogle's Reports (Ireland).
Arn.—Arnold's Reports, Common Pleas.
Atk.—Atkyn's Chancery Reports.
Atl. Rep.—Atlantic Reporter (U. S.)

B. & A.: B. & Ad.: B. & Adol.—Barnewall and Adolphus' Reports, King's Bench.
B. & Ald.: sometimes B. & A.: Barn. & A.—Barnewall and Alderson's Reports, King's Bench.
B. & C.: B. & Cr.: Barn. & C.—Barnewall and Cresswell's Reports, King's Bench.
B. & P.: Bos. & P.: Bos. & Pul.—Bosanquet and Puller's Reports, Common Pleas, Exchequer and House of Lords.
B. & S.: Best & S.: Best & Sm.—Best and Smith's Queen's Bench Reports.
Bail Court Rep.—Queen's Bench.
Bailey.—Law Reports (South Carolina).
Barb.—Barbour's Supreme Court Reports (New York).
Barnard.—Barnardiston's King's Bench Reports.
Barnes' Notes.—Barnes' Notes of Cases in the Common Pleas.
Barr.—Barr's Reports (Pennsylvania).
Barton.—Barton's Reports (New Brunswick).
Bay.—Bay's Reports (Missouri).
Beav.: Beavan.—Beavan's Chancery Reports.
Bennett.—Missouri Reports.
Bennett & Heard: Leading Cr. Cases.—Bennett and Heard's Leading Criminal Cases (Boston, U. S.)
Bibb.—Kentucky Reports.
Bing.—Bingham's Reports, Common Pleas, etc.
Bing., N. C.—Same, New Cases.
Binney: Binn.—Pennsylvania Reports.
Bissell.—U. S. District Court Reports.
Bl., H.—Henry Blackstone's Reports, Common Pleas and Exchequer.
Bl., W.: Black., R., W.—William Blackstone's Reports.
Black. U. S. Rep.—Black's United States Reports.
Blackf.—Blackford's Supreme Court Reports (Indiana).
Bli., N. S.—Bligh's Parliamentary Reports, New Series.
Boston Law Rep.—Law Reports (Boston, U. S.)
Boston Law Rep., N. S.—Same, New Series.
Boston Monthly Law Reports.—Same.
Brad.: Bradw.—Bradwell's Appellate Decisions (Illinois).

...v.: Brevard.—Brevard's Reports of ...e Constitutional Court (South Carolina).
...d. & B.—Broderip and Bingham's ...eports, Common Pleas.
... Parl. Cas.: Brown's Cas. Parl.—...own's Cases in Parliament.
...wne, P. A.—Pennsylvania Reports.
...wnl.—Brownlow Entries.
...st.—Bulstrode's Reports, King's ...nch.
...—Burrows' Reports, King's Bench.
...bee.—Busbee's Law Reports (North ...arolina).
...h.—Bush's Reports (Kentucky).

...B.: Com. B.—Common Bench Re...orts.
...B., N. S.: Com. B., N. S.—Same, ...ew Series.
... & E.: Cababe & E.—Cababe and ...llis, Queen's Bench Reports.
... & F.: Cl. & F.—Clark and Finnelly's Reports, House of Lords.
... K.: Car. & K.: Car. & Kir.—Carrington and Kirwan, Common Law Reports.
... & M.: Car. & M.: Car. & Marsh.—Carrington and Marshman's Nisi Prius Cases.
...M. & R.: Cr. M. & R.—Crompton, Meeson and Roscoe's Exchequer Reports.
...P.—Common Pleas.
... D.—Common Pleas Division.
... P.: C. & P. (N. P.): Car. & P.—Carrington and Payne, Nisi Prius Reports.
...: Caines: Cai. T. R.—Caines' Term Reports (New York).
...—California Reports.
...p.: Camp. N. P. Cas.—Campbell's Reports, Nisi Prius.
... Sup. Ct. Rep.—Supreme Court Reports (Ontario).
... Law Repos.—Carolina Law Repository.
...: Carter.—Carter's Reports (Indiana).
...th.—Carthew's Reports, King's ...

Cinc.: Cinn.—Cincinnati Superior Court Reports (Ohio).
City Hall Recorder (New York City).
City Hall Reporter (New York City).
City Ct. Rep.—City Court Reports (New York City).
Clarke.—Clarke's Iowa Reports.
Clayt.: Clayton.—Clayton's Assizes Reports.
Cliff.—Clifford's United States Circuit Court Reports.
Code Rep.—Code Reports (New York)
Code Rep., N. S.—Same, New Series.
Co.: Coke: Coke R.—Reports of Sir Edward Coke.
Cold.: Coldw.—Coldwell's Reports (Tennessee).
Colo.—Colorado State Reports.
Comb.—Comberbach's Reports, King's Bench.
Comyns' R.:—Comyns' Reports, King's Bench and Common Pleas (England).
Conn.—Connecticut Reports.
Const. Rep.—Constitutional Reports (South Carolina).
Cooke & Alc.—Cooke & Alcock, King's Bench (Ireland).
Cow:: Cowen.—Cowen's Reports (New York).
Cowp.—Cowper's King's Bench Reports.
Cox C. C.: Cox Crim. Cas.: Cox Cr. Cas.—Cox's Criminal Cases.
Cr. & Jer.: Cromp. & J.—Crompton & Jervis, Exchequer Reports.
Cr. & M.—Crompton and Meeson's Exchequer Reports (England).
Cr. C. C.: Cranch Cir. Ct.—Cranch's United States Circuit Court Reports.
Cro. Car.—Croke, King's Bench and Common Pleas Reports, Time Charles I.
Cro. Cas. Res.: C. C. Reserved.—Law Reports, Crown Cases, Reserved.
Cro. Eliz.: Cro. Jac.: Cro. J.—Same, Time Elizabeth; James I.
Curt.: Curtis C. C.—Curtis' United States Supreme Court and Circuit Reports.
Curt.: Curteis Ecc. R.—Curteis' Ecclesiastical Reports.
Cush.—Cushing's Reports (Massachusetts).
...ish.—...shing's Reports (Mississippi).
... & ... Davison and
... Bench.
... D. ... Dowl. R.: Dowl.
... ...land's King's
... ...mon Pleas
... ...orts, United
... ...).

Daly.—Daly's Reports, Common Pleas (New York City).
Dana.—Dana's Reports (Kentucky).
Day.—Connecticut Reports.
De G. M. & G.—De Gex, MacNaghten and Gordon, Chancery Reports.
De Gex.—Bankruptcy Reports.
Den.: Denio.—Denio's Reports (New York).
Dev.: Devereux's Law Reports (North Carolina).
Dev. & B.: Dev. & Bat.—Devereux and Battles, Law Reports (North Carolina).
Dick.—Dickens' Chancery Reports.
Dill.: Cir. Ct. R.—Dillon's Reports, United States Circuit Court.
Doug.—Douglas, King's Bench Reports.
Doug.—Douglass' Michigan Reports.
Dow. & Clark.—House of Lords Cases.
Dowl.: Dowl. P. C.: Dowl. Pr.: Dowl. Pr. C.: Dowl. Pr. Cas.—Dowling's Practice Cases, King's Bench, Common Pleas and Exchequer.
Dowl. P. C., N. S.: Dowl., N. S.—Same, New Series.
Dowl. & L.—Dowling and Lowndes, Practice Cases.
Draper's Up. Can. Rep.—King's Bench Reports (Upper Canada).
Duer.—Duer's Superior Court Reports (New York City).
Dudley.—Dudley's Reports (Georgia).
Dutch.: Dutcher.—Dutcher's New Jersey Law Reports.
Duvall.—Duvall's Reports, Kentucky.
Dyer.—Dyer's Reports.

E.: East.—East's Reports, King's Bench.
East P. C.—East's Pleas of the Crown.
Edmonds' Rep.—Edmonds' Reports (New York).
Edm. Sel. Cas.: Edmonds' Sel. Cas.—Edmonds' Select Cases (New York).
Edw.—Edwards' Chancery Reports.
E. & B.: El. & B.: El. & Bl.: Ell. & Bl.—Ellis and Blackburn's Reports, King's Bench.
El. B. & E.: Ellis, B. & E.—Ellis, Blackburn and Ellis' Reports, Queen's Bench and Exchequer (England).
El. & El.—Ellis and Ellis' Reports.
Eng.—English's Reports (Arkansas).
Eng. C. Law Rep.—English Common Law Reports.
Eng. Law & Eq. Rep.—English Law and Equity Reports.
Esp.: Esp. Cas.—Espinasse's Cases at Nisi Prius, King's Bench and Common Pleas.
Ex.: Exch.—Exchequer Reports.
Ex. D.—Exchequer Division Reports.
Ex. Div. (C. A.)—Exchequer Division Reports, Cases on Appeal.

F. & F.: Fos. & F.: Fost. & F.: Fost. & Fin.—Foster & Finlason, Nisi Prius Reports.
Fed. R.: Fed. Rep.—Federal Reporter (United States Courts).
Fitzg.—Fitzgibbon's Reports, King's Bench.
Fla.—Florida Reports.
Fost.: Foster.—Foster's New Hampshire Reports.
Fox & Sm.—Fox and Smith's Reports, King's Bench (Ireland).
Freem.: Freeman.—Freeman's Reports (Illinois).

G. & B.: G. & D.: Gale & Dav.—Gale and Davison's Reports, Queen's Bench.
Ga.—Georgia Reports.
Gale—Gale's Term Reports, Exchequer.
Gilb. Cas.—Gilbert's Cases in Law and Equity.
Gill.—Maryland Reports.
Gill & Johns.—Gill and Johnson's Reports (Maryland).
Gilman.—Illinois Reports.
Godb.—Godbolt's Reports, Queen's Bench.
Golds.: Goldsb.—Goldsborough's Reports, King's Bench.
Grant: Grant's Cases.—Grant's Cases (Pennsylvania).
Gratt.—Grattan's Reports (Virginia).
Gray.—Massachusetts Reports.
Green.—New Jersey Reports.
Greenl. Rep.—Greenleaf's Reports (Maine).
Greene, G.—Iowa Reports.

H. & C.: Hurl. & C.: Hurl. & Colt.—Hurlstone and Coltman's Reports, Exchequer.
H. & N.: Hurl. & N.: Hurl. & Nor.—Hurlstone and Norman's Exchequer Reports.
Hagg. Ecc. R.—Haggard's Ecclesiastical Reports.
Hall.—Superior Court Reports (New York).
Halst.—Halstead's New Jersey Law Reports.
Ham.—Hammond's Reports (Ohio).
Har. & J.: Har. & Johns.—Harris and Johnson's Reports (Maryland).
Har. & McHen.—Harris and McHenry's Reports (Maryland).
Har. & W.—Harrison's and Wollostan's Reports, King's Bench.
Hard.: Hardin.—Hardin's Reports (Kentucky).
Hard.: Hardres.—Reports, Exchequer (Ireland)

ing.—Harrington's Reports (Delware).
s.—Pennsylvania State Reports.
: Harrison.—New Jersey Law ports.
iin R.—Reports, Hawaii (Sandh Islands).
s.—North Carolina Reports.
.—Haywood's Reports (North Carina).
.—Tennessee Reports.
h—Maine Reports.
k.—Heiskell's Reports, Tennessee.
—Hetley's Reports, Common Pleas.
—Hill's Reports (New York).
—Hill's Law Reports (South Carha).
and Denio.—Hill and Denio's Rets (New York).
Hilton.—Hilton's Reports, Comn Pleas (New York).
.: Hobart.—The Reports of Sir Henry Hobart.
ges.—Term Reports, Common Pleas.
.: Holt N. P.: Holt's N. P. C.—olt's Reports of Cases at Nisi Prius, ommon Pleas.
t.—Cases temp. Sir John Holt.
t R.—Holt's Reports, King's Bench.
Lords' Cas.: House L.—House of ords' Cases.
.—Howard's Reports (Mississippi).
.: Howard's Ct. of Appeal Cases.
.—Pr. R.: How. Pra. Rep.—Howd's Practice Reports (New York).
. U. S.: How. U. S. Rep.—Howd's Reports, United States Supreme ourt.
. St. Tr.—Howell's State Trials.
. & Br.: Hudson & Br.—Hudson nd Brooke's Reports, King's Bench reland).
mph.—Humphrey's Reports (Tennessee).
n.—Hun's Reports, Supreme Court New York).
t.—Hutton's Reports, Common Pleas.

.—Illinois Reports.
—Indiana Reports.
a.—Iowa Reports.
Ir. L. T. R.—Irish Law Times Reports.
Ir. R. Com. L.—Irish Reports, Common Law.

J. & S.: Jones & S.—Jones and Spencer, Superior Court Reports (New York).
J. P.—Law Reports, Justice of the Peace.
Jac.—Jacobs' Chancery Reports (England).
Jac. & Walk.—Jacob and Walker, Chancery Reports.
Jebb. & S.: Jebb. & Symes.—Queen's Bench Reports (Ireland).
Jenk.—Jenkins' Reports (Jenkins' Centuries), Exchequer.
Jo., Sir T.—Sir Thomas Jones' King's Bench Reports.
Johns.—Johnson's Reports, Supreme Court, etc. (New York).
Johns. Cas.—Johnson's Cases, Court of Errors (New York).
Jones.—Exchequer Reports (Ireland).
Jones: Jones' L.: Jones' Law.—Jones' Law Reports (North Carolina).
Jones, W.—King's Bench Reports.
Jur.—The Jurist (England).
Jur., N. S.—Same, New Series.

Kan.: Kans.—Kansas Reports.
Keb.: Keble.—Keble's Reports, King's Bench.
Kel.: Kely.—Kelyng's Reports, King's Bench.
Kelly.—Kelly's Reports (Georgia).
Kent.: Ky.—Kentucky State Reports.
Kerr.—Kerr's Reports (New Brunswick).
Keyes.—Keyes' New York Reports.
Kirby.—Kirby's Reports (Connecticut).

L. C. J.: Low. Can. J.—Lower Canada Jurist.
L. J. C. P.: Law Jour. C. P.—Law Journal Reports, Common Pleas.
L. J. R.: Law Jour. R.—Law Journal Reports.
L. J. R., N. S.: Law Jour. R., N. S.—Same, New Series.
L. N.: Leg. N.—Legal News (Quebec).
L. R. C. P.: Law R. C. P.—Law Re-

Malk.—Moody & Mal-
Reports.
V.: Moo. & P.—Moore
mmon Pleas.
R.: M. & Ry.—Man-
nd's Reports, King's

& R.: Moo. & Rob.—
binson's Nisi Prius Re-

Sel.: Mau. & Sel.—
yn, King's Bench Re-

Sc.: Moo. & S.: Moo.
and Scott's Reports,
(England).
& W.—Meeson and
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and's Exchequer Re-

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as.—Macqueen's Re-
Lords.
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ournal.—British Amer-

eports.—British Amer-

R.—Manning's Michi-

eports, King's Bench.
K. Marshall's Reports

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(England).
J. Marshall's Reports

United States Circuit

— Massachusetts Re-

-Maule and Selwyn's
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Rep.—Australia.
s' Rep., N. S.—Men-
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...s. St. Cas.—Morris' Mississippi State ...ases.
...: Mo. R.—Missouri Reports.
... App.—Missouri Appeal Cases.
...d.—Modern Reports.
...n. B.: Monr. B.: Monroe, B.—B. ...Monroe's Reports (Kentucky).
...nr.—T. B. Monroe's Reports (Kentucky).
...nth. Law Bul.—Monthly Law Bulletin (New York).
...nt. & Ayr.—Montagu & Ayrton, Bankruptcy Cases.
...t. D. & G.—Montagu, Deacon & ...e Gex, Bankruptcy Cases.
...nthly Law Reporter—Boston, Mass.
...o. & Mal.: Moo. & Malk.—Moody and Malkin Nisi Prius Reports.
...ore: Moore, F.: Moore, Pri. C. C.—Moore's Reports, Privy Council (England).
...nf.—Manford's Reports (Virginia).
...r. Rep.—Murray's Jury Court Reports (Scotland). Murray's Rep. of Jury Cas.
...urph.: Murphey.—Murphey's Reports (North Carolina).

...& M.: Nev. & M.: Nev. & Man.—Neville and Manning, Magistrates' Cases.
...C.: N. Car.: No. Car.: Nor. Car.—North Carolina Reports.
...E.: N. East.: No. East.—Northeastern Reporter (U. S.)
...H.: N. H. Rep.: New Hamp.—New Hampshire Reports.
...J.: N. J. L.: N. J. L. R.—New Jersey Law Reports.
...R.: New R.—Bosanquet and Puller, New Reports, Common Pleas.
...W.: N. W. Rep.: N. West. Rep.: No. West.: No. West. R.—Northwestern Reporter (U. S.)
...Y.—Court of Appeals Reports (New York).
...Y. Civ. Pro. Rep.—New York Civil Procedure Reports.
...Y. Crim. R.—New York Criminal Rep...

New Mag. Cases.—New Magistrates' Cases.
Nott & M.: Nott & McC.—Nott and McCord's Reports (South Carolina).
Noy.—Noy's Reports, King's Bench.

Ohio.: Ohio R.—Ohio Reports.
Ohio St.—Ohio State Reports.
Oldbright.—Supreme Court Reports (Nova Scotia).
Ontario Supreme Ct. Rep.—Ontario's Supreme Court Reports (Canada).
Ore.: Oregon.—Oregon State Reports.
Otto.—Otto's United States Supreme Court Reports.
Overt.—Overton's Reports (Tennessee).

P. & W.—Penrose and Watts, Pensylvania Reports.
P. Wms.—Peere Williams' Chancery Reports.
Pa. C. C. Rep.—Philadelphia Circuit Court Reports.
Pac. Rep.—Pacific Reporter (U. S.)
Pa. St.: Pa. St. R.—Pennsylvania State Reports.
Paige.—Paige's New York Reports.
Palm.: Palmer. — Palmer's Reports, King's Bench.
Parker's Crim. R.—Parker's Criminal Reports (New York).
Pat. Cas. Rep.—Patent Cases Reports.
Paton.—Appeal Cases, House of Lords.
Peake: Peake's Cas.—Peake's Nisi Prius Cases.
Peake's Add. Cas.—Peake's Additional Cases at Nisi Prius.
Pearson.—Pearson's Reports (Pennsylvania).
Peck.—Peck's Tennessee Reports.
Penn.—Pennsylvania Reports (Penrose and Watts).
Penn. N. J. Rep.: Pennington.—Pennington's New Jersey Reports.
Penn. St.: Penn. St. R.: Penn. St. Rep.: —Pennsylvania State Reports.
Penr. & Watts: Pen. & W.: Penrose & Watts.—Penrose and Watts' Pennsylvania Reports.
Per & D.: Perr. & D.—Perry and Davison' Reports, Queen's Bench (England).

...tes Supreme
...rcuit Court
...Rep.—Phila-
...egal Intellig-
...e's Ecclesasti-
... (Massachu-

Pike.—Pike's Reports (Arkansas).
Pittsb.—Pittsburg Reports (Pennsylvania).
Poph.—Popham's Reports, King's Bench.
Port.: Porter.—Porter's Reports (Alabama).
Price.—Price's Exchequer Reports.
Price Pra. Cas.—Price's Practice Cases (England).
Priv. C. C.—Privy Council Cases.
Prob. & Div.—Law Reports, Probate and Divorce.
Prob. & Matri.—Same, Probate and Matrimonial.
Pug.—Pugsley's Reports (New Brunswick).

Q. B.—Queen's Bench Reports.
Q. B. D.—Law Reports, Queen's Bench Division.
Q. B., N. S.—Queen's Bench Reports, New Series.
Quebec L. R.—Quebec Law Reports.

R. I.—Rhode Island Reports.
R. & M.: Ry. & M.—Ryan and Moody, King's Bench and Common Pleas Nisi Prius Cases.
Ramsay's App. Cas.—Ramsay's Appeal Cases (Ontario).
Rawle.—Rawle's Reports (Pennsylvania).
Raym. Ld.—Lord Raymond's Reports, King's Bench and Common Pleas.
Raym. T.—Thomas Raymond's Reports, King's Bench.
Red.—Redington's Reports (Maine).
Rep. Con. Ct.: Rep. Const. Ct.—Mills' Reports, Constitutional Court (South Carolina).
Rep. of Cas. of Prac. in C. P.—Reports of Cases of Practice in the Common Pleas.
Rep. Temp. Hardwicke.—King's Bench Reports, Time of Lord Hardwicke.
Reporter, The.—Reports of Cases in the different States (Boston, U. S.).
Rich.: Rich. Law.—Richardson's Law Reports (South Carolina).
Ridgeway, L. & S. Ir. Term Rep.—Ridgeway, Lapp and Schoale's Irish Term Reporter.
Rob. Ecc.—Robertson's Ecclesiastical Reports.
Robertson.—Robertson's Reports, Superior Court (New York City).
Rolle: Rolle R.—Rolle's Reports, King's Bench.
Root.—Root's Reports (Connecticut).
Russ. C. R.—Russell's Chancery Cases.
Russ. & R. Cr. Cas. Resd.—Russell and Ryan, Crown Cases Reserved.

S. & R.: Serg. & R.—Sergeant and Rawle's Reports (Pennsylvania).
Salk.—Salkeld's King's Bench Reports (England).
Sand.: Sandf.—Sandford's Superior Court Reports (New York City).
Saund.—Saunders' Reports, King's Bench
Saund. W.: Saunders, W. — Saunders' Reports, by Williams.
Say.: Sayer.—King's Bench Reports.
Scam.—Scammon's Reports (Illinois).
Scott.—Scott's Reports, Common Pleas.
Sc. N. R.: Scott, N. R.—Scott's New Reports, Common Pleas.
Selw. N. P.—Selwyn's Nisi Prius Reports.
Sess. Cas.—Cases in the Court of Sessions (Scotland).
Shaw, App. Cas.—Shaw's Scotch Appeal Cases.
Shaw.—Shaw's Vermont Reports.
Shep.—Shepley's Reports (Maine).
Show.—Shower's Reports, King's Bench.
Sid.: Siderfin.—Siderfin's Reports, King's Bench.
Sim.—Simons' Chancery Reports.
Sim., N. S.—Same, New Series.
Sim. & S.—Simons and Stuart's Chancery Reports.
Sir Geo. Lee's Cas. in Eccl. Cts.—Sir George Lee's Judgments of Phillimore's Ecclesiastical Reports (England).
Sir T. Jo.—Sir Thomas Jones' Reports, King's Bench.
Skin.—Skinner's Reports, King's Bench.
Sme. & M.: Smedes & Marsh.—Smedes and Marshall's Reports (Mississippi).
Smith.—Smith's Reports (Indiana).
Smith, E. D.—E. D. Smith's Reports, Common Pleas (New York City).
Smith, J. P.—King's Bench Reports.
Smith, P. F.—Pennsylvania State Reports.
Sneed.—Sneed's Reports (Kentucky).
Sneed.—Sneed's Tennessee Reports (1 vol.)
So.: So. Rep.—Southern Reporter (U. S.)
So. East.: So. East. Rep.—Southeastern Reporter (U. S.)
So. West.: So. West. Rep.—Southwestern Reporter (U. S.)
Speers.—Speers' Reports (South Carolina).
Spencer.—Spencer's Reports (New Jersey).
Stark.: Stark. R.: Stark. Cas.—Starkie's Reports of Cases at Nisi Prius.
St. Tr.: State Tr.: State Trials.—Howell's State Trials.
Stew.: Stew. & Por.: Stew. & Port.—Stewart's Reports (Alabama); Stuart and Porter's Reports (Alabama).

ck.—Stockton, New Jersey Equity Reports.
ry.—United States Circuit Court Reports.
.: Stra.: Strange.—Strange's Reports, King's Bench.
ob.: Strobh.: Strobhart.—Strobhart's Reports (South Carolina).
.: Style.—Style's Reports, King's Bench.
p. Ct.: Supr. Ct.—Superior Court Reports (New York).
b. Ct. Rep. (T. & T.)—Thompson and Cook's Supreme Court Reports (New York).
preme Court Reporter.—United States Supreme Court.
pp. to Hill & Denio's Rep.—Supplement to Hill and Denio's Reports (New York).
. & Tr.—Swabey and Tristram's Reports, Courts of Probate and Divorce.
vans.—Swanston's Chancery Reports.
veeny.—Sweeny's Superior Court Reports (New York City).

. & C.—Thompson and Cook's Reports, Supreme Court (New York).
. R.: Term R.—Term Reports, King's Bench.
aunt.—Taunton's Reports, Common Pleas.
ayl.—Taylor's Reports (North Carolina).
enn.—Tennessee Reports.
ex.: Texas.—Texas Reports.
exas App.—Texas Appeal Cases.
ex. Law Rev.—Texas Law Review.
hach. Crim. Cas.—Thacher's Criminal Cases (Massachusetts).
rans. App.—Transcript Appeals, New York Court of Appeals.
yler.—Tyler's Reports (Vermont).
r. & Gr.—Tyrwhitt and Granger's Reports, Exchequer (England).
yrw.—Tyrwhitt's Reports, Exchequer.

. S.—United States Supreme Court Reports.

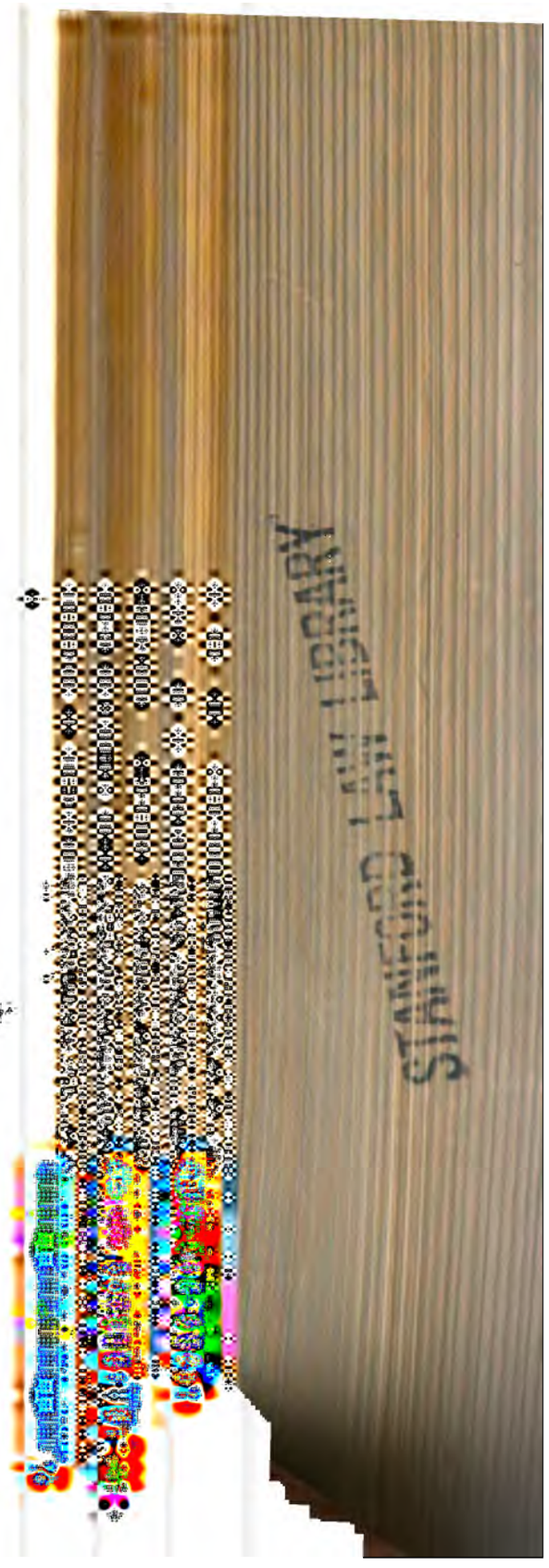
Va.—Virginia Reports.
Vent.: Ventr.: Ventris'.—Ventris' Reports, Common Pleas (England).
Vern. R.—Vernon, King's Bench Reports (England).
Ves.—Vesey's Chancery Reports.
Ves. Jr.—Vesey's, Jr. Chancery Reports.
Vict. L. J.—Victoria Law Journal (Australia).
Vict. Law Rep.—Victorian Law Reporter (Australia).
Vict. Law Times.—Victoria Law Times (Australia).
Vroom.—Vroom's New Jersey Law Reports.
Vt.: Vermont.—Vermont Reports.

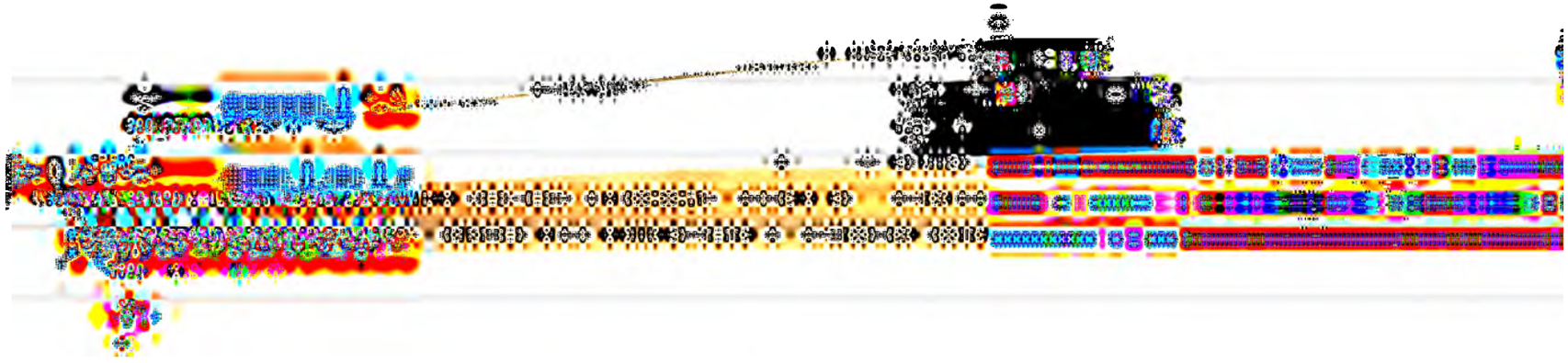
Walk.: Walker.—Walker's Reports (Mississippi).
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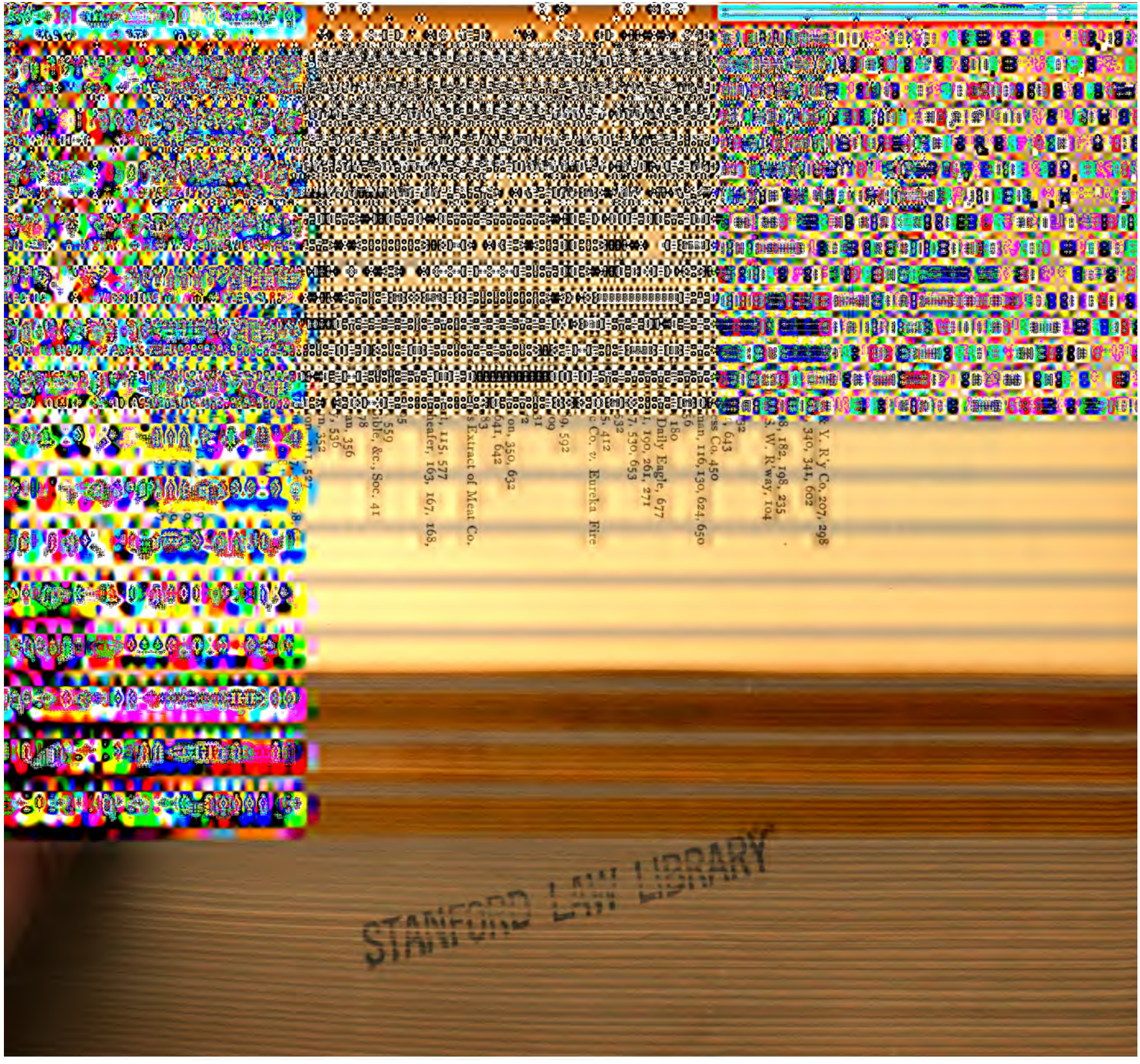
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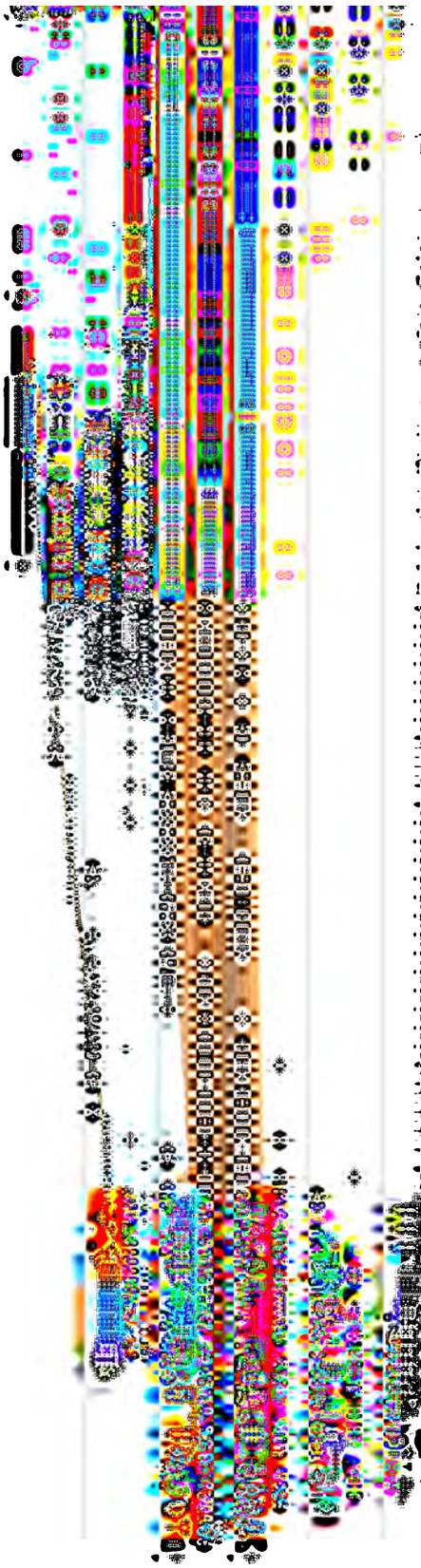
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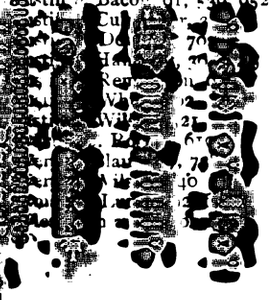



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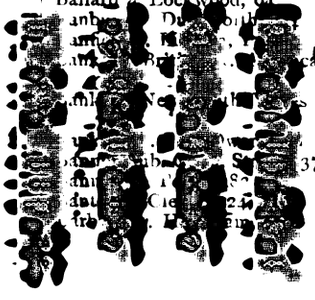


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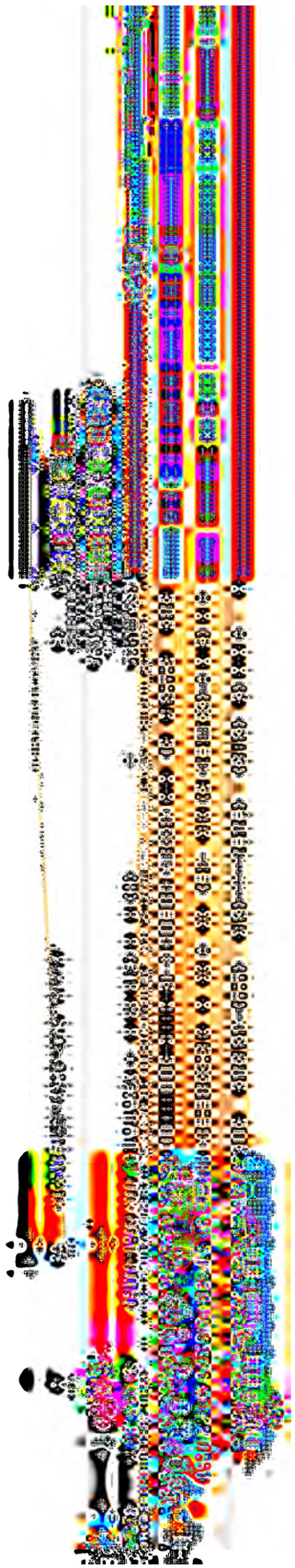
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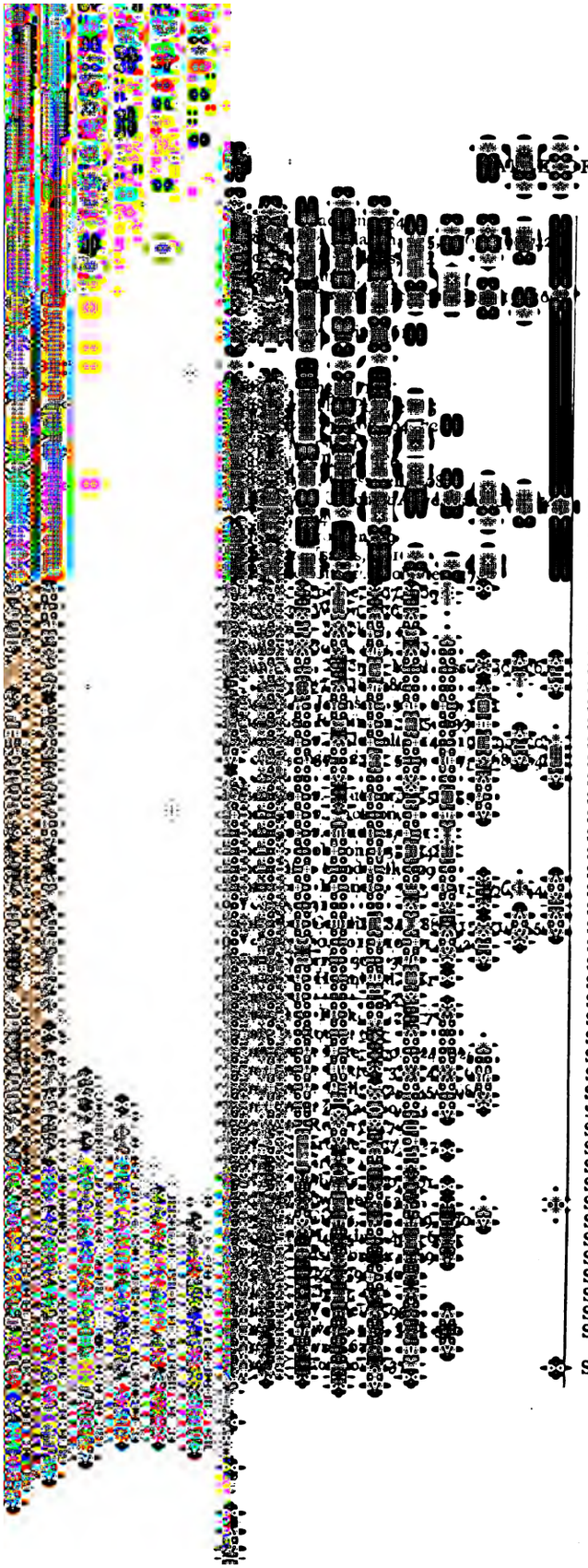
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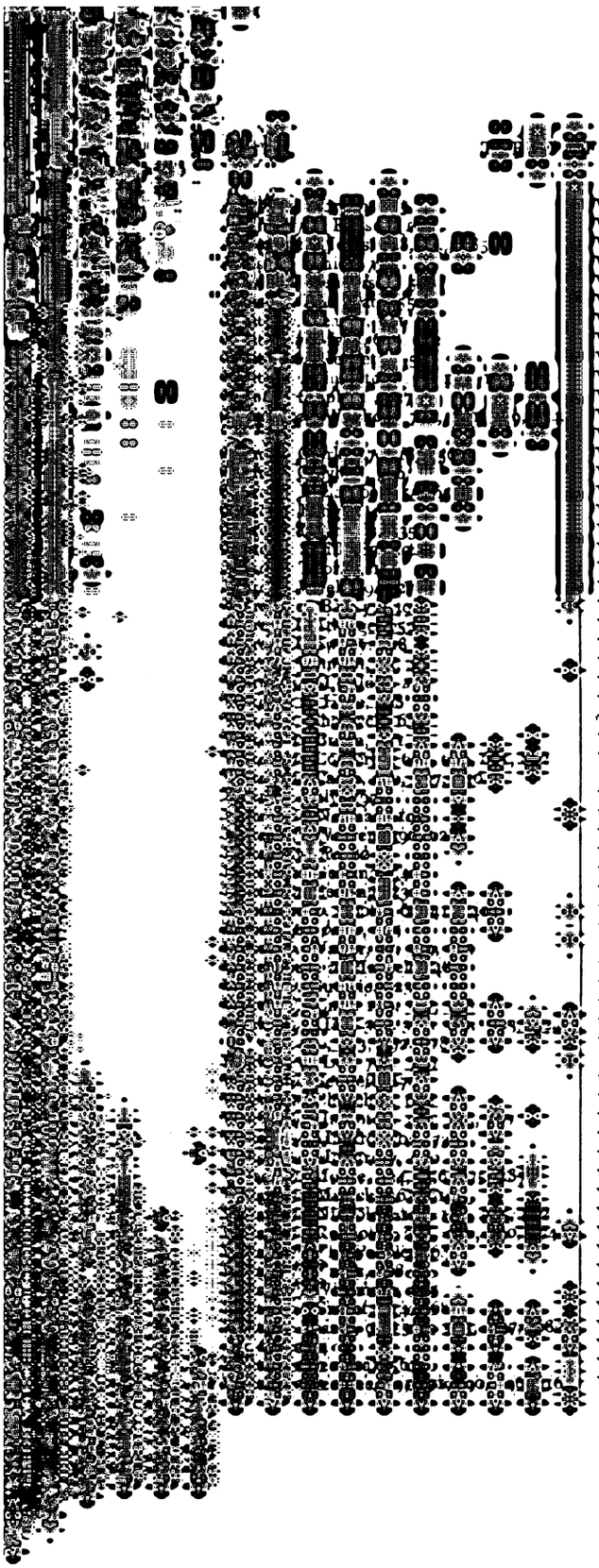
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PART I.

THE LAW

OF

SLANDER AND LIBEL.



SLANDER AND LIBEL.

CHAPTER I.

INTRODUCTORY.

Language as a means of effecting injury—Slander—Libel—Defamation—Redress—The law of libel—Object in view—Division of subject—Attempts to define libel.

§ 1. Among the means which one individual may employ to affect another or to affect society in general are sounds and signs.[1] Language, in so far as it is the medium for communicating or exciting ideas, consists of a system of sounds and signs, and is the chief among the sounds and signs which affect individuals or society in general.[2] Language expressed in sound is oral language

[1] As ringing bells, firing guns, beating drums, clapping hands, hooting, &c., see Martin *v.* Nutkin, 2 P. Wms. 266; Soltan *v.* De Held, 2 Sim. N. S. 133; 16 Jur. 326; First Bap. Ch. *v.* Sch. R. R. Co. 5 Barb. 79; Tarleton *v.* McGawley, Peake's Cas. 205; Moshier *v.* Utica & Sch. R. R. Co. 8 Barb. 427; Cole *v.* Fisher, 11 Mass. 137; Loubz *v.* Hafner, 1 Dev. 185; Gregory *v.* Brunswick, 6 M. and G. 953; Trustees. &c. *v.* Utica, &c. 6 Barb. 313; Davidson *v.* Isham, 1 Stock. 186; Rogers *v.* Elliott, 25 The Reporter, 496; Supreme Court, Mass. March, 1888, and see 37 Alb. L. J. 347; noise of pupils in schools, Com. Dig. Act. on Cas. c. 294; noise in manufacturing steam boilers, Fish *v.* Dodge, 4 Denio, 311; barking of dogs, Brill *v.* Flagler, 23 Wend. 354. See an article entitled "Noisy Nuisances," published in New York Daily Transcript, January 10th, 1871. In Lansing *v.* Smith, 8 Cow. 146, Sutherland, J., compares the action for a nuisance to an action for slander for words not actionable in themselves.

[2] "There is nothing in nature but may be an instrument of mischief." (Ld. Chief J. Pratt, in Chapman *v.* Pickersgill, 2 Wils. 145.)

"A very great part of the mischiefs which vex the world arise from words." (Burke, in a letter to his son.) Incautious language is the dry rot of the

sed in signs is written lan-

mont *v.* Reeve, 8 Adol. and Ell. 483; and 1 Siderfin, 375, where one Cooper brought an action upon the case against Witham and his wife, for that the wife maliciously intending to marry him, did often affirm that she was sole and unmarried, and importuned *et strenue inquisivit* the plaintiff to marry her; to which affirmation he gave credit, and married her, when *in facto* she was wife of the defendant; so that the plaintiff was much troubled in mind, and put to great charges, and damnified in his reputation. He had a verdict, but no judgment; for by Twisden, J., the action lies not, because the thing here done is felony; no more than if a servant be killed, the master cannot have an action *per quod servitium amisit*, *quod curia concessit;* see also Vidian's Entries, where is a form of declaration for saying: Regard brothers went to a house which was a brothel and ought to be torn down, special damage that the house was torn down. As to defamation by deed, see Of Libels: An Institute of the Laws of England, by Thomas Wood, LL.D., 1720. Where a banker having sufficient funds in hand belonging to his customer, dishonors that customer's check, he is liable to an action for damages. (Robinson *v.* Marchant, 7 Q. B. 918; and see Marzetti *v.* Williams, 1 B. & A. 415.) And where a notary protested a note for non payment, without having previously presented the note to and demanded payment of the maker, he was held liable in an action for the damage thereby occasioned to the reputation of the maker. (MS.)

The following case occurred in Lower Canada: Lebeau sued Turcot for damages. arising out of the facts that both were members of the same church, that Turcot took up the collection in that church, and that Turcot intentionally, and for the purpose of humiliating Mr. Lebeau and holding him up to ridicule, passed him by without giving him the opportunity of making the usual contribution. The defendant plead that his services were gratuitous; that he was therefore un-

guage, or writing and effigy. By writing[1] is intended to be understood, every means of symbolizing language by alphabetic characters, with every kind of implement, as pen, pencil, graver, type; with every kind of pigment, as ink, lead, chalk; on any kind of substance, as paper, parchment, linen, wood, copper, steel, stone, or on any fence, wall or post.[2] And by effigy being intended to be understood every other means of communicating or exciting ideas other than by speech or by writing.[3] Effigy, therefore, includes pictures, statues, gestures.

§ 2. The effects of language may be beneficial or in-

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der no obligation to take the collection from Lebeau, and that moreover it was through inadvertence that he omitted to pass the plate to that gentleman. The court held the latter allegation disproved; it was shown that defendant had spoken to several people about the affair, laughed with them about it, and told them to watch Lebeau and see what he would do. Even if defendant's services were gratuitous, he was bound to perform them in a right manner and without subjecting any one to ridicule. It was a very small matter, but the defendant was in the wrong. Judgment was given for $5, with costs.

Language, however licentious and abusive, is not a trespass (Adams *v.* Rivers, 11 Barb. 397) nor an assault (Meade and Belts case, 1 Lewin C. C. 184), but language may aggravate a trespass. (Mirest *v.* Harvey, 5 Taunt. 442; Bell *v.* Midland Ry. Co. 10 C. B. N. S. 308.) Language may constitute an imprisonment (Homer *v.* Battyn, Buller's N. P. 62; Pike *v.* Hanson, 9 N. H. Rep. 491), and cruelty. (Durant *v.* Durant, 1 Hagg. Ecc. R. 769; Lockwood *v.* Lockwood, 2 Curteis' Ecc. R. 281, cited and approved Bihin *v.* Bihin, 17 Abb. Pr. R. 26.) A recognizance to keep the peace is not forfeited by reproachful words. (4 Bl. Com. ch. xviii.) As to speech being the foundation of a criminal prosecution, see 2 Bishop on Crim. Law, § 813, and note to § 8, *post*.

If a man menaces my tenants at will, of life and member, *per quod* they depart from their tenures, an action upon the case will lie against him, but the threatening without their departure is no cause of action. (Vin. Ab. Actions on Case, N. c. 21.)

Action lies for threatening workmen to maim and prosecute them, whereby the master lost the selling of his goods, the men not daring to go on with their work. (Garret *v.* Taylor, Cro. J. 567, pl. 4, A. D. 1621; Skinner *v.* Kitch, Law Rep. 2 Q. B. 393; see, however, Ashley *v.* Harrison, 1 Esp. 48, and *post*, § 201.)

[1] Writing includes printing (Saunderson *v.* Jackson, 2 Bos. and Pul. 238; Henshaw *v.* Foster, 9 Pick. 318) and marks with a lead pencil (Geary *v.* Physic, 5 B. and C. 238; Classon *v.* Bailey, 14 Johns. 484), or chalk (Mortimer *v.* M'Cullan, 6 M. & W. 58). An English clergyman was tried for libelling another by sowing in his garden seeds in such a manner that when they germinated they exhibited the words "Whitehead is a scamp." See Bouvier's Law Dict. tit. Effigy.

[2] Austin *v.* Culpepper, Skin. 123; Show. 314.

[3] Reg. *v.* Sullivan, 11 Cox's Crim. Cas. 44; DuBost *v.* Beresford, 2 Camp. 512; Jeffries *v.* Duncombe, 11 East, 226; Mezzara's Case, 2 City Hall Recorder, 113; Johnson *v.* Commonwealth, 14 Atl. Rep. 425.

may amount to a wrong, redress by law. The of its remedy and of the the means employed to

sly affected by speech as ; and, in that event, the slander[1] or a slander, and nderer.

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sted or imprisoned for a slander *usation*) of mortal offense, before was thereof indicted by the oaths honest men before those who had thority to take such indictments." irrour of Justices, ch. xi. § 22.) "In same year the mysseles (lepers) rowoute Cristendom were *slaun-ed* that they had made covenant h Sarasenes for to poison all Cris-men." (Capgrave's Chronicle of gland, p. 186.)

In a document addressed by the an and Chapter of Aberdeen to hop Gordon, dated January 5, 1558, he following:

"*Imprimis*, that my Lord Bishop se the kirkmen within his diocie to orm themselves in all their *slan-rous* manner of living, and to re-ve their open concubines, as well at as small. *Secundo*, that his rdship will be so good as to show ificative example—in special in re-ving and discharging himself of the mpany of the gentlewoman by whom is greatly *slandered*; without the ich be done, diverse that are part-s say they cannot accept counsel correction of him which will not rect himself," &c., &c. (Reg. erd. lxi.)

If any *slanderously* charge another n any false crime (Ridley's Civil w, 31); and in the statute 3 Edw. ch. xxxiv, none are to publish false s whereby *slander* may grow be-en the king and his people.

Mis-say, to slander, to speak ill. encer.)

§ 4. One may be so injuriously affected by writing or effigy as to be what is termed libeled; and, in that event, the writing or effigy so affecting him is called libel or a libel, and he who puts forth such writing or effigy (the publisher or venter) is denominated a libeler,[1] "one whose heart is more dark and base than that of an assassin, or than his who commits a midnight arson."[2]

§ 5. So, too, formerly in England, one might be so injuriously affected by language, whether in the form of speech, writing, or effigy, as to be what was termed defamed;[3] in which event the language so affecting him was

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"I would not, . .
Have you so *slander* any moment's leisure
As to give words or talk with the Lord Hamlet." (Shakespeare.)

[1] "Libeler—he who shall, to the infamy of another, write, compose, or publish a book, song, or fable, or maliciously procure any of those acts to be done, is guilty of a *libel*." (Just. Inst.)

"The distinction between the satirist and the libeler is, that the one speaks of the species, the other of the individual; the one holds the glass to thousands in their closets, that they may contemplate the deformity, and thereby endeavor to reduce it, and thus by private mortification avoid public shame. Thus the satirist privately corrects the fault, like a parent, while the libeler mangles the individual like an executioner." (Joseph Andrews, vol. II, 5.)

"And indeed there is not in the world a greater error than that which fools are apt to fall into, and knaves with good reason to encourage, the mistaking a satirist for a libeler." (Pope, Anon. Satires and Epistles—Advertisement.)

"The early English satirists were mighty in their vocation against the lawyers, the regular and secular clergy, and the more eminent professors. The political ballad-mongers aimed higher. They stoutly supported Simon de Montfort against Henry the Third. This support was probably the occasion for the statute of 1275, 'against slanderous reports or tales to cause discord betwixt king and people.'" (See The Barons' War, &c., by W. H. Blaauw, M. A.; The Miracles of Simon de Montfort, Camden Soc. Pub.)

A barrator is a mover of suits and quarrels in courts . . . . by spreading false rumors and reports to raise discord among neighbors. (1 Coke's Inst. 368.) Lampooner, see 3 Lev. 248.

[2] Oswald's Case, 1 Dall. 329. Fielding gives the following description of a slanderer: "Vice hath not, I believe, a more abject slave; society produces not a more odious vermin; nor can the devil receive a guest more worthy of him, nor possibly more welcome to him, than a slanderer."

[3] *Defamed* seems formerly to have been used in the sense of charged, thus in the form of indictment referred to in "The Mirrour of Justices," we find it so used; as thus: "I say, Sebourge there is *defamed* by good people of the sin of heresy," &c., and in Lord Somers' Tract on Grand Juries, "the constitution intrusts such inquisitions in the hands of persons of understanding . . . that might suffer no man to be falsely accused or *defamed*." "Thieves openly defamed and known." (4 Bl. Com. ch. xxii.) "There is a *fame* against Mr. Spencer for not burying Edward Merrick as a Christian ought to be." (Calendar of State Papers, Domestic Series, of the

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guage is the means by
have been effected the
dition, blasphemy, pro-
mny, scolding, brawling,
more.[3]

or tort, cognizable by
which is a civil action
the case for words," and
or for slander.[4]

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siastical Statutes, p. 336, and
us notes; and see Jacob's Law
tit. Cuckinstool An action lies
conspiracy to defame. Wildee
cKee, 1 Central Reporter, 919;
e Reporter, 469; Mott *v.* Dan-
6 Watts, 304; Haldeman *v.*
n, 10 Barr. 369; Hood *v.* Palmer,
237; Buffalo Lubricating Oil Co.
ndard Oil Co. 42 Hun, 153-7.
enmark, there was a species of
called Bersöglisvisur or free-
ing song. When King Magnus
bout A. D. 1040) gave dissatis-
n to his subjects, a meeting was
t which lots were drawn as to
one of those assembled should
ss one of these songs to the king.
Det Norske Folkes Historie, 3
Christiania, 1852-5; also Den
ke Erobring of England og Nor-
ict, Copenhagen, 1863, and
British Review, Nov., 1863.
Slander is not, like libel, an in-
le offense. (Bailey *v.* Dean, 5
207.) Nor is a single precedent

§ 9. Libel is both a public wrong or crime and a private wrong or tort, cognizable by the common law. The remedy for the public wrong is by indictment or by criminal information.[1] The remedy for the private wrong is a civil action, known as an action or the action of or for libel.

§ 10. Defamation was an ecclesiastical offense, cognizable only in the ecclesiastical courts, by a proceeding in such courts.[2]

§ 11. The redress sought in the actions of slander and libel is a pecuniary compensation, called damages, for the injury sustained by the party complaining, to be recovered from the party complained against, and is intended solely for the benefit of the complainant;[3] on the other hand, the proceeding in the ecclesiastical court was, in theory at least, one solely for the benefit of the party complained against. It was to awaken him to a sense of the

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of any criminal proceeding for unwritten imputations upon the characters of individuals to be found, except in cases of high treason, . . . and it must have been as constituting rather an offense against the government, than an injury to the individual, and being therefore seditious, that words reflecting on a magistrate in the immediate execution of his office were for the first time in the reign of Queen Anne held to be indictable. (Reg. *v.* Langley, 2 Ld. Raym. 1060; Holt R. 654. But I am not aware that Mr. Starkie has adverted to this case, or to the doctrine which is laid down in it. (1 Mence on Libel, 90.) See Precedent of Indictment for Slander, 13 Texas App. 220; 2 Index Reporter, 357.

In Folkard on Libel, 586, it is said: "In all cases where the matter charged is not actionable, except on proof of special damage, it cannot be the subject of an indictment."

The party libeled may resort to both remedies. The conviction for a libel is no defense to a civil action for the same publication. Folkard, 686. Said not to be a mitigation of damages. Bundy *v.* Maginess, 18 Pac. Rep. 668.

[1] See Information, Mandamus, and Prohibition, by John Shortt.

[2] Suits in ecclesiastical courts for defamation were abolished in England by statutes 18 & 19 Vict. ch. xli, and in Ireland by statutes 23 & 24 Vict. ch. xxxii.

[3] "Action for slander is to recover damages for *words spoken* of a person who is thereby injured in his reputation, and for *words spoken* of a person which affect his life, office, profession, or trade, or which tend to his loss, or occasion any particular or special damage to him." (Onslow *v.* Horne, 3 Wilson, 177.) Suits for slander are "sometimes rendered necessary for the protection of character wickedly and unjustly assailed, but much more frequently prosecuted by men of questionable character from a wicked spirit of litigation and a sordid hope of gain." Senator Lee, in Dolloway *v.* Turrill, 26 Wend. 397; *post*, note to § 142.

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[1] As to suits in spiritual or ecclesiastical courts, they are for the reformation of manners or for punishing of heresy, *defamation*, laying violent hands on a clerk, and the like. . . . Things that properly belong to these jurisdictions are matrimonial and testamentary and defamatory words for which no action lies at law, as for calling one adulterer, fornicator, usurer, or the like (Jacob's Law Dict. tit. Courts Ecclesiastical). The courts of Piepowder had jurisdiction of certain actions for slander. (Jacob's Law Dict. tit. Court of Piepowders.)

purpose we desire not merely to collect, epitomize and classify under appropriate titles, the reported adjudications, but to probe the subject to its core and unfold the principles which it involves; to show not only what has been decided, but the principles of those decisions; to lay down, if we can, such rules as will enable one under any given state of circumstances to determine when a wrong, as slander or libel, has occurred, when a remedy may properly be sought, and how it may be pursued and obtained. To accomplish this aim, we shall advert to some elementary principles, the relevancy of which may not at once be apparent, but the reason for which will be observed as we proceed, and without a reference to which we should in vain attempt to make ourselves or our subject understood.

§ 15. A thorough investigation into elementary principles seems peculiarly necessary in treating on the law of libel, because it is a branch of the law in which, perhaps, more than any other, principles have, from various causes, been most subject to perversion by undue influences, have been less scientifically treated and more superficially considered. The law of libel has been denounced as vague, fluctuating and incomprehensible. Of the decisions on the subject many are conflicting, more are scarcely reconcilable, and the reasoning in support of all is, with very few exceptions, more or less weak, obscure, and unsatisfactory. It has almost been claimed or conceded that there is something so subtle in the principles of the law of libel as to elude detection, and the law of libel has come to be regarded as a parasitical growth on the main body of the law, presenting features so exceptional as to render inapplicable those general principles which govern other branches of legal science.[1] It will be our endeavor to

[1] A noted peculiarity of the law of libel is its vagueness and uncertainty. (Encyc. Brit. *voce* Libel.) Holt, writing in 1816, says: "It is indeed in the

show that properly understood there is nothing exceptional in the wrongs called slander and libel, nor in the legal principles applicable to these wrongs; that these wrongs are governed by the same principles which apply to all other wrongs; and that there is nothing in the law of libel itself which should render it more difficult to comprehend than any other division of jurisprudence.

§ 16. While profoundly sensible of the difficulty properly to execute this, our self-imposed task, and of our comparative inability to do justice to the subject, we nevertheless flatter ourselves that we shall be able to lay before our readers a more systematic outline of the principles of the law of libel than any which has hitherto been offered or attempted.[1]

§ 17. Chief among the difficulties to be encountered is the combating many of the existing theories and ideas on the subject, most of them coming down to us with the prestige of high authority, hallowed by time, and all of them received for law. We esteem it an error and a misfortune that among text writers on legal subjects there has been such a reverence for precedent, such an unquestioned following the one of the other,[2] so little attempt

very nature of the subject (the Law of Libel) that it is extremely difficult to clear it of those popular conceits and of that vagueness of generality which adhere to it as a question of political discussion. (Holt on Libel, Preface.)

[1] "Though I could not be ignorant either of the difficulty of the matter which he that taketh in hand shall soon find, or much less of my own inability, which I had continual sense and feeling of, yet because I had more means of absolution than the younger sort, and more leisure than the greater sort, I did think it not impossible to work some profitable effect, the rather because where an inferior wit is bent and conversant upon one subject, he shall many times, with patience and meditation, dissolve and undo many knots, which a greater wit, distracted with many matters, would rather cut in two than unknit; and at the least, if my invention or judgment be too barren or too weak, yet, by the benefit of other arts, I did hope to dispose or digest the authorities and opinions . . in such order and method as they should take light one from another, though they took no light from me." (Bacon's Introduction to his Reading on the Statute of Uses.)

[2] Making new books, as apothecaries make new mixtures by pouring out of one vessel into another. (Burton Anatomy of Melancholy, repeated by Sterne.)

at enlarged and connected views of their subjects in their principles untrammeled by precedent, rendering text-books collections of materials for essays rather than essays. For ourselves, we brave being deemed presumptuous, in the hope that we may be useful, and where, after the many years of patient reflection we have bestowed upon our subject, we have arrived at any conclusion which conflicts with existing ideas or decisions, we shall be deterred neither by the antiquity of the precedent, nor the high position of its author or its indorsers, from expressing our dissent.[1] Besides a general and connected view of the subject, we shall study to present a faithful record of all the adjudged decisions and dicta, and as really we have no pet theory to maintain, and are influenced solely by the desire to elicit the true principles on which the law concerning our subject is based, we shall be especially careful throughout to distinguish from received authorities what are merely our inferences or suggestions; and we promise our readers most religiously to abstain from any intentional garbling of authority or the willful withholding of any decision or dictum in order to support any particular view or theory. The meager attempts heretofore made to reduce the subject into any systematic form obliges us, to a considerable extent, to treat the subject as *res nova*.

§ 18. We have divided our subject into two principal divisions—slander and libel. Slander and libel have this in common, that each may be, and usually is, effected by means of language. As we have described them, their distinguishing feature of difference is, that the one is effected by oral language, the other by written language. To language in writing is, in *most* cases, attributed a greater capacity for injury than is attributed to language spoken or speech, so that language which, if spoken, gives no

[1] "Of what account are the most venerated opinions if they be untrue? At best they are only venerable delusions." Sir William Hamilton.

right to redress, may, if reduced to writing, give a cause of action.[1] It is proper to say that the broad distinction

[1] A distinction was very early taken in the Roman law between slander spoken and written, and the *iniuria verbalis* was deemed to constitute a much lower degree of injury than the *malum carmen* and *famosus libellus*. (Holt on Libel, 21.) Holt wrote in 1816. He says, p. 225: "It has *lately* become a question whether there be any difference between written and unwritten slander;" and then he refers to Bradley *v.* Methuen, 2 Ford's MS. 78, in which Lord Hardwicke is reported to have said that courts do make a distinction "between words written and bare words." In Thorley's Case, 4 Taunt. 355, the question was: Whether an action would lie for words *written*, when such action would not lie for them if *spoken?* "For myself," said Chief Justice Mansfield, "I cannot, upon principle, make any difference between words written (as to the right which arises out of them to bring an action) and words spoken; but the difference has been recognized by the courts for at least a century backwards, and has been established by Lords Hardwicke, Hale, Holt, and others."

This species of defamation (libel) is usually called *written scandal*, and hereby receives an aggravation in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer, and to propagate wider and farther than any other scandal. (Bac. Abr.)

The distinction between *verbal* and *written slander* proceeds upon the principle that words are often spoken in heat upon sudden provocations, and are fleeting and soon forgotten, and therefore less likely to be permanently injurious; while written slander is more deliberate and malicious, more capable of circulation in distant places, and consequently more likely to be permanently injurious. (1 Chit. Gen. Pr. 45.)

The *great distinction* between libel and slander is, "that from a libel damage is always implied by law, whereas some kinds of slander only are actionable without proof of special damage." (Broom's Com. p. 513 [762].)

Words written and published may be actionable which, if spoken, would not be so without special damage. But they must be such as, in the common estimation of mankind, are calculated to reflect shame and disgrace upon the person concerning whom they are written, or hold him up as an object of hatred, ridicule and contempt. (Fonville *v.* McNease, 1 Dudley [So. Car.], 303.) As to what is libelous, and as to the distinction between libel and slander. (Rice *v.* Simmons, 2 Harring, 417; Layton *v.* Harris, 3 Harring, 406.) *Vox emissa volet, litera scripta manet.* (Beebe *v.* Bank of N. Y. 1 Johns. 529, 571.)

In 1685, on the occasion of bringing in a bill to make words disparaging the King's (James II) person or government treason, it was opposed by Serjeant Maynard, on the ground, among others, that words "were often ill heard, and ill understood, and were apt to be misrecited by a very small variation." When others insisted that "out of the abundance of the heart the mouth speaketh," he brought the instance of our Saviour's words: Destroy *this* temple, &c., and showed how near *the* temple was to *this* temple, *pronouncing it in Syriac*, so that the difference was almost imperceptible. (5 Camp. Lives of Chanc. ch. ciii, p. 21.)

There was something superstitious in the horror with which the Icelanders regarded a libel, and no offense among them was more surely or bloodily avenged than the publication of satirical verses, or the setting up of a *Nid*—that is, an insulting or indecent figure, or a horse's head on a pole—on the lands of another. (See "The Story of Burnt Njal; or, Life in Iceland at the End of the Tenth Century." By George W. Dasent, D. C. S.) It is a marked trait in the character of the Russian people to "feel corporeal punishment less sensibly than a verbal insult. This idea has a

we have drawn between slander and libel is not one universally adopted;[1] indeed it is not the one, in our judgment, the most logically correct; but we adopt it partly in deference to a very prevalent use of the terms slander and libel, to distinguish between an injury by speech and an injury by writing, and partly because by this arrangement one word suffices to denote to which particular branch of the subject we refer. In our opinion, the more logical arrangement would be to take slander or defamation as the generic term, and then indicate the division by the epithets oral and written. There are, however, objections to this division—among others, that it omits effigy. Another mode of dividing the subject is to take libel for the generic term, and then distinguish the kind by the epithets defamatory, seditious, &c.[2] This is objectionable on many

religious foundation; a good Christian cannot admit that the punishment of fustigation which has been inflicted on the Saviour of humanity can be for a man a stain of infamy; he believes that a verbal insult affects the immortal part of man, whereas a blow only produces suffering in the least noble part of his being." (Essai sur l'Histoire de la Civilization en Russie, par Nicolas de Gerebtzoff, Paris, 1858, vol. ii, p. 575; Westminster Review, January, 1864, art. Russia.)

[1] It does not apply to the wrong called slander of title, nor to language affecting one in his calling or office, nor to proceedings in the ecclesiastical courts. As to this last, see Ware *v.* Johnson, 2 Sir Geo. Lee's Cases in Eccles. Courts, 103. Holt says, p. 211: "It is evident, moreover, from the authorities, that words written of a man tending to disparage him in his profession will support an action, although the same words when spoken will not;" and he refers to King *v.* Lake, Hardres, 471; but that case does not authorize any such doctrine.

[2] Blackstone speaks of blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels. (4 Bl. Com. ch. xi.) And Lord Bolingbroke, writing to Queen Anne, Oct. 17, 1711, says: "I have discovered the author of another *scandalous libel*, who will be in custody this afternoon; he will make the thirteenth I have seized, and the fifteenth I have found out." In Borthwick on Libel, 25, note, it is said: His Lordship seems to have retained the adjective [infamous] in reference to the usual meaning of the word *libel*, when not qualified, in the law of Scotland, which is the same [meaning] as it still has in the spiritual courts of England. It would appear, however, that, even in the courts of common law in England, there was formerly some doubt whether *libel*, or *libellus*, by itself, was the proper technical expression. This we learn from a note (a, p. 4) in the "Digest of the Law Concerning Libels." "Lord Chief Justice Raymond," says the author, "in Curl's Case, said that he did not think that *libellus* was always to be taken as a technical word, and asked whether action would lie *de quodam libello intitulat*—the New Testament—and whether the spiritual court did not proceed upon a libel? Mr. Justice Fortescue said a libel was a technical word at *common law*. Mr. Justice Reynolds said that *libellus did not, ex vi termini, import defamation*, but was to be governed

grounds. Upon the whole, we conclude that the division we have adopted will be found obnoxious to fewer objections, and be more convenient, than any other we could have selected. In describing the matter of a slander or a libel—that is, the speech or writing which may or may not constitute a slander or a libel, but which is charged to be a slander or a libel—we shall designate it speech or writing, as the matter of slander or libel may be intended; but generally, and where both slander and libel are used, shall employ the term language or defamatory matter. Neither judges, advocates, nor text writers confine themselves to the terms slander and libel, but employ the terms libel, slander, scandal, calumny, defamation, detraction, verbal injury, and some others, without any accord as to, and with very little regard for, their definitions or connotations.

by the epithet added to it." (2 Stra. 791.)

In Thorley's Case, 4 Taunt. 355, the expression "written and unwritten slander" is used, and Lord Coke says: Every infamous libel is in writing or not in writing.

Mr. Heard, in his treatise on libel and slander (§ 8), uses the phrase "actionable libel." This implies that there may be a libel which is not actionable. He also uses the phrase printed libel. In the index to the same treatise is the phrase "ironical libel."

The Encyclopædia Britannica, *voce* Libel, uses the phrase "defamatory libel;" and the statute 6 and 7 Vict. ch. xcvi, uses the term "defamatory words and libel" in lieu of "slander and libel."

"The high court of the Paris Parliament commenced a prosecution against him for *libelous defamation*." (Westminster Review, July, 1860, art. The French Press, page 118, Am. Reprint.)

"Mr. J. Mackenzie's Narrative, *a false libel*, a defense of Mr. G. Walker, &c., 1690." is the title of a pamphlet published in 1690. And the phrase "*false slander*" is used. Finch's Law, 185.

In an ordinance agreed to by both houses of the English Parliament, 30th September, 1647, the word *libel* seems to be used in the sense of a book or pamphlet. The ordinance runs thus: "That what person soever shall make, write, print, publish, sell or utter any book, pamphlet, treatise, ballad, *libel*, or sheet of news whatsoever, or cause so to be done, except the same be licensed by both or either house of Parliament," &c. The word *libel* cannot here mean a defamatory publication, as it is not to be supposed the Parliament would in any case license a defamatory publication.

Sometimes any unfair statement is called a libel, and we say it is a libel on humanity, on the goodness of God, &c.

"The phrase, 'action *for words*,' might seem to be always, as it generally is, employed by the English lawyers, in reference alone to words *spoken*. This, however, is not the case. Thus, Mr. Tomlins, in his Law Dictionary (*voce* Action, II, § 1), says: 'Action on the case *for words*, which is brought for words spoken or *written*.' This passage may be remarked as another instance of the varied meaning of legal phrases." (Borthwick on Libel, 22, *note*.)

We shall confine ourselves throughout to the terms slander and libel, and employ them as distinct terms and as marking the division between an offense by means of speech and an offense by means of writing or effigy; but in using the phrase *law of libel*, we desire, nothing being said to the contrary, to be understood as meaning and including as well the law applicable to what we call slander as to what we call libel.

§ 19. From some cause—perhaps from the fact that language in writing may amount to a public wrong—it has happened that the wrong occasioned by writing (libel) has occupied a larger share of attention than has the wrong occasioned by speech (slander).[1] Whether this is sufficient to account for the circumstance or not, these facts result, that while it is common to speak of the law of libel, it is quite uncommon to speak of the law of slander; and while ingenuity has been tortured to frame a definition of libel or a libel, scarcely any attempts have been made to frame a definition of slander or a slander.

§ 20. The attempts which have been made to define *libel* or *a libel* are so many as to be practically innumerable, yet they have in reality been unavailing; no definition, properly so called, of libel or a libel exists.[2] The

[1] Notwithstanding, we observe that "A Book of Entries, by W. B." A. D. 1671, contains eighteen precedents of declarations for slander and not one for libel—"The English Pleader," A. D. 1734. contains several declarations in slander, but not one in libel.

[2] "It is to be observed that no correct, no logical definition of a libel has ever been given." (George on Libel, 14.)

Lord Lyndhurst, in answer to the question, how far it was possible to define libel, said: "It is a subject to which I have paid considerable attention, but I must freely own without any success whatever. I hold it to be hardly possible to define libels by which guilt may be incurred as tending to a breach of the peace, to other proceedings of a violent nature, . . and to a variety of other heads. . . . Any definitions that I have ever seen given had one or other of two faults, . . . they were either so vague as not to specify or define anything, or . . they were only rendered particular and definite by omitting some species of libel . . . which ought to have been comprehended. . . . I have never yet seen, or been able myself to hit upon anything like a definition of libel . . which possessed the requisites of a definition, and I cannot help thinking that the difficulty is not accidental, but

term libel being connotative, its definition to be complete should unfold the whole meaning it involves, the whole of what is connoted; should "select from among the whole of its properties those which shall be understood to be designated and declared by its name;" "those which unfold its nature, which are peculiar to it, and which are not found in a like combination elsewhere." This describes a *real definition*, of the kind called *essential*, and before we can frame such a definition, we must know all the properties of our subject, and then select those proper for the purpose. As a libel comprehends a complex aggregate of particulars, either not all known or not all agreed upon, it may be impossible to circumscribe them by a correct and compact general description.[1]

§ 21. The definitions which have been attempted have been framed as supposed standards by which to determine of any given proposition whether or not it constitutes a libel; and experience demonstrating the total worthlessness for any practical purpose of these *supposed* definitions, it has come to be taken for granted, at least by some, that there is that inherent in the subject which prevents the

essentially inherent in the nature of the subject. . . . The Latin of libel is not *libellus* but *libellus famosus*. . . . Libel then means, in its original, not 'little book' but a 'defamatory little book.' . . . Libel is an offense of a somewhat vague description, but sufficiently known in law, and, perhaps, as well defined as assaults and some others; and I do not believe, from all the experience I have had, that in practice any considerable difficulty is felt on account of its indistinctness." (Report of House of Lords on Defamation and Libel, July, 1843.) "This confusion or uncertainty is probably to be ascribed as much to the intrinsic difficulty of the subject as to any striking defectiveness in the rules." (Marcy, J., Rogers *v.* Rogers, 3 Wend. 522.) In Flood on Libel, 29, it is said: The word libel "as a term of law, in the sense we have agreed to attribute to it here, like the offense it serves to indicate, may perhaps be better described, if not indeed defined, than almost any other in the whole of our jurisprudence."

At Rome, the cards of the races, with the names and colors of the riders and drivers, were called *libelli*.

Davies, in his Supplementary English Glossary, gives as a definition of Libel: Lye, because false; bell, because loud.

[1] "As certain acts done with certain motives must combine with such meanings to make up the offense of libel, . . . it is not strictly correct to say of any meaning whatsoever, apart from those acts and intentions, that it is a libel." (George on Libel, 57.)

possibility of its definition. This, although imputed to libel as a peculiarity, is not so in fact; the like difficulty attaches to many other terms,[1] and particularly to every other wrong. An attempt to frame a concise, real, essential definition of any other wrong will disclose the like difficulties as occur in the case of libel.[2]

[1] See Davidson *v.* Bd. of Ad., &c., of N. Orleans, 96 U. S. 104; 17 Alb. L. J. 223, as to evolving by gradual process of judicial decision the meaning of the phrase "Due process of law."

[2] As Cousin said, when asked to state in a single sentence the spirit of German philosophy: "These things do not sum themselves up in single sentences," another has said, "Most definitions are but phrases to cover our ignorance."

We subjoin some specimens of the attempts to define libel:

In Wilson *v.* Walter, see in note to § 219, *post*, the plaintiff, a barrister, gave the following neat designation of libel: "Defamation without legal excuse." We esteem this as the most successful among the many attempts to define libel. (See § 50, *post*.)

It is not infamous matter or words which make a libel: for, if a man speak such words, unless they are *written*, he is not guilty of the making of a libel; *writing is of the essence of a libel*. (Ld. Raym. 416.) In order to constitute a *libel*, the subject-matter complained of must be a subject of visible perception. But, provided only it be an object of visible perception, a libel does not appear to be confined to any particular form or shape. By the requisite, which is essential to the existence of a libel, that it be an object of visible perception, *libel*, is distinguished from what is technically called *defamation or spoken slander*. Again: "The words most nearly synonymous to the word *libeling*, are *defaming*, *disparaging*, *aspersing*, *slandering*." (George on Libel, pp. 33, 36, 41.)

"A libel is a contumely or reproach, published to the defamation of the government, of a magistrate, or of a private person." (Comyn's Digest.)

A libel is a malicious *publication*, tending to the disrepute of an individual, the breach of the peace, the seditious violation of the good order of government. (Capel Loft's Essay on Libels, edit. 1785, p. 6.)

The American Encyclopedia, *voce* Libel, refers to the following definition of libel as the best definition: "A libel is any published defamation." And the same article states the difference between libel and slander to consist in this, that libel is published defamation, and slander is spoken defamation.

Written defamation is otherwise termed libel, and oral defamation slander. (Burrill's Law Dict.)

Defamatory words, written and published, constitute a libel. (Maunder.)

Libel, a word which has many different meanings, but is chiefly known in this country as the name of a department of the law, which, from incidental circumstances, has come to include the naturally distinct heads of written slander, seditions, and outrage against religion. (Encyc. Brit. *voce* Libel.)

A libel has been *usually* treated of as scandal, written or expressed by symbols. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology. (Russell's Treatise on Crimes and Misdemeanors, edit. 1819, p. 308.)

In a strict sense, it [libel] is taken for a malicious defamation, expressed either in printing or writing; in a larger sense, the notion of libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by affixing up a gallows at a man's door, or by painting him in a shameful and ignominious manner. (Hawkins' Pl. Cr.)

Libel, a criminous report of any

§ 22. It is rare, indeed, that we can frame a real, essential definition, but by a definition is sometimes under-

man, cast abroad or otherwise unlawfully published in writing, but then, for difference sake, it is called an infamous libel – *famosus libellus*. (Minshœi: A Guide into the Tongues, &c., London, 1627.)

Written or printed slanders are libels. (Bouvier.)

In the indictment against the Seven Bishops the expression *libel in writing* is used, and by Coke, every infamous libel is in writing or not in writing. "All publications injurious to private character or credit of another are libelous." (Addison on Wrongs, referred to as a good definition, McNally *v.* Oldham, 8 Law Times Rep. N. S. 604.)

"A libel is anything of which any one thinks proper to complain." (Essay prefixed to report of Finnerty's Trial, supposed to be from Jeremy Bentham's Writings.) It is also quoted thus: "A libel is anything published upon any matter of anybody, which any one was pleased to dislike." (Attributed to Bentham, cited in pamphlet: Trial of David Lee Child. See, however, Popular Progress in England, 446.) In answer to this it has been said: "An actionable libel cannot be created out of nothing." (Press Co. *v.* Stewart, 12 Cent. Rep. 278.)

A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent towards government, magistrates, or individuals. (*Per* Hamilton arg. People *v.* Crosswell, 3 Johns. Cas. 354; adopted Steele *v.* Southwick, 9 Johns. 214; Cooper *v.* Greeley, 1 Den. 347.)

A libel is a malicious publication in printing, writing, signs, or pictures, imputing to another something which has a tendency to injure his reputation, to disgrace or to degrade him in society, and lower him in the esteem and the opinion of the world, or to bring him into public hatred, contempt, or ridicule. (State *v.* Jeandell, 5 Harring. [Del.] 475.)

Everything written of another, holding him up to scorn and ridicule, and calculated to provoke a breach of the peace, is a libel. (Torrance *v.* Hurst, Walker, 403; Newbraugh *v.* Curry, Wright, 47.)

Every publication by writing, printing, or painting, which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, odious, or ridiculous, is *prima facie* a libel, and implies malice in the publisher. (White *v.* Nicholls, 3 How. U. S. 266.)

A publication, to be a libel, must tend to injure the plaintiff's reputation, and expose him to public hatred, contempt and ridicule. (Armentrout *v.* Moranda, 8 Blackf. 426.)

Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred, or ridicule, or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society, is a libel. (Dexter *v.* Spear, 4 Mason, 115.)

A libel is a malicious publication, expressed either in printing or writing or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule. (Commonwealth *v.* Clapp, 4 Mass. 163, 168. *Per* Ch. J. Parsons, quoted in Root *v.* King, 7 Cow. 613. See Finch *v.* Vifquain, 11 Neb. 280; Rosewater *v.* Hofman, 38 N. W. Rep. 857.)

Contemptuous demeanor towards a corpse was by the Roman Law an insult to the heir of the deceased. (Dig. 47; 10, 1.) Libelling the dead, see Reg. *v.* Labouchere, 12 Q. B. D. 320; Comw. *v.* Batchelder, Thach. Crim. Cas. 191.

A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous intent. (The State *v.* Farley, 4 McCord, 317.)

A publication is a libel which tends to injure one's reputation in the common estimation of mankind, to throw contumely or reflect shame and disgrace upon him, or hold him up as an

stood such an explanation of a given term as conveys an idea of its connotation, and enables us to distinguish it

object of hatred, scorn, ridicule, and contempt, although it imputes no crime liable to be punished with infamy, or to prejudice him in his employment. So every publication by writing, printing, or painting, which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous, is *prima facie* a libel. (1 Hilliard on Torts, ch. vii, § 13.)

Holt, in his treatise, p. 213 [223], defines libel as against private persons thus: "Everything, therefore, written of another which holds him up to scorn and ridicule, that might reasonably (that is, according to our natural passions) be considered as provoking him to a breach of the peace, is a libel." Mr. Mence (Law of Libel, vol. I, p. 120), referring to this passage in Holt, says: "This agrees with his two preceding definitions, and with the common acceptation of the term libel, by making it essential that the subject or object of the attack should be some person or persons; but it disagrees with them, by introducing the tendency to provoke a breach of the peace. It follows that, if this be a correct definition, the other two must be defective, because, in one of them, the tendency, or (as is there said) *the intent* to provoke is required only in cases where the object of the slander is a deceased person, and in that from Lord Coke it is wholly omitted. On the other hand, if the two former definitions be correct, the third must necessarily be inaccurate, for an accurate definition is one which neither omits what is essential, nor admits what is superfluous. . . . . And it is to be further observed that the third definition disagrees with the two former and the common acceptation of the term *libel*, not only by introducing the intent or the tendency to provoke, but by leaving out the falsehood and malice. For *libel*, in common acceptation, signifies written slander; and the term slander and all its synonyms, as defamation, detraction, calumny, even without the epithets malicious and injurious, imply falsehood and malice."

"The familiar acceptation of the word libel is no less simple and intelligible [than the term horse stealing], but the legal and technical use is as if *horse stealing* stood not only for stealing a horse, but for murder, arson, larceny, and other crimes more or less atrocious; and even for actions not criminal, or of which the criminality is at least doubtful, and not to be measured or ascertained till we have separated them from the greater crimes with which they are confounded. This perverse and cabalistic use of language it is that has given birth to so much of the obscurity with which the law of libel is reproached. And nothing can be easier than to reform it. We have only to consider written challenges to fight as a class by themselves; to class blasphemous writings under the head of blasphemy; obscene and grossly indecent or immoral writings under the head of obscenity; or both these heads, together, under that of offenses immediately against God; seditious writings under the head of sedition; and all other writings denominated libels under the two distinct heads of libels and censure, as they are either tainted with falsehood and malice, or criminal by carrying upon them the manifest intent to provoke a breach of the peace, or by having a tendency, or of being merely suspected of having a tendency, so to do." And, on page 181, he says: "Thus is blasphemy, under the title of libel upon the Christian religion, classed or confounded, as is obscenity also, with crimes (if crimes they be), from which it differs as much, both in kind and degree, as murder does from picking a pocket or robbing a henroost." (1 Mence on Libel, 125.)

In several of the States, libel has been *defined by statute*. Thus, the Criminal Code of New York, § 242: A malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which ex-

from, and prevents our confounding it with, any other term of a *similar*, but not the *same*, import. When we employ definition in this sense, and for this purpose merely, it ceases to be important whether the definition adopted be strictly accurate. If we always employ the term in that one predetermined sense, it serves to avoid confusion, and enables us to reason upon it with certainty. Mathematical science is certain, not because its definitions are true, but because they are certain; and legal science is uncertain only because its definitions are uncertain.[1] We may in-

poses any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation, is a libel. And the *proposed* Civil Code of New York, § 32: Libel is a false and unprivileged publication by writing, printing, picture, effigy, sign or other wise than by mere speech, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

§ 33. Slander is a false and unprivileged publication, other than libel, which:

1. Charges any person with a crime involving moral turpitude, or with having been indicted, convicted, or punished for such crime.

2. Imputes in him the present existence of a loathsome disease;

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects, which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit;

4. Imputes to him impotence or a want of chastity; or,

5. Which by a natural consequence causes actual damage.

In Maine, it is enacted that "a libel shall be construed to be the malicious defamation of a person, made public either by any printing, writing, sign, picture, representation, or effigy, tending to provoke him to wrath, or expose him to public hatred, contempt, or ridicule, or to deprive him of the benefits of public confidence and social intercourse; or any malicious defamation, made public as aforesaid, designed to blacken and vilify the memory of one that is dead, tending to scandalize or provoke his surviving relatives or friends." And in Illinois it is enacted: "A libel is a malicious defamation, expressed either by printing or by signs, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him or her to public hatred, contempt or ridicule." Definitions of the like import are to be found in the statute books of some other States.

See Maine Rev. Stat. 1840, ch. clxv, § 1; Iowa Rev. Code of 1851, ch. cli, art. 2767; Arkansas Rev. Stat. 1837, div. VIII, ch. xliv, art 2, § 1, p. 280; Georgia, Prince's Dig. pp. 643, 644; Hotchk. Dig. p. 739; Cobb's Dig. vol. ii, p. 812; California Stat. 1850, ch. xcix, § 120; Illinois Rev. Stat. 1845, Crim. Code, § 120; Dakota Penal Code, § 6511. "Any malicious injury to good names, other than by words orally spoken, is a libel."

[1] "Mathematics will, in no greater degree than theology or metaphysics,

sure certainty by having definitions which, however defective in other respects, at least admit of our using the terms defined always in one and the same sense, and by always so using them. We shall not attempt to construct real definitions of slander and libel; but to definitely mark what is meant when those terms are employed; we define slander and libel as *wrongs occasioned by language or effigy*—that is to say, *slander is a wrong occasioned by speech*, and *libel is a wrong occasioned by writing or effigy.*

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give us 'certainty by rigid demonstration,' without the assumption of those primary truths which we accept because we are so constituted that we must accept them." (Westminster Review, October, 1864, art. Dr. Newman's Apologia.) The question, What is the foundation of mathematical demonstration? was discussed by Dugald Stewart, and the conclusion at which he arrived was, that the certainty of mathematical reasoning arose from its depending on *definitions*. And further, that mathematical truth is hypothetical; if the definitions are assumed, the conclusions follow. Mr. Whewell controverts these views. See "The Mechanical Euclid," &c., and Remarks on Mathematical Reasoning, &c., by the Rev. W. Whewell, M. A., and Edinburgh Review, April, 1838.

"Nothing is harder than a definition. While, on the one hand, there is for the most part no easier task than to detect a fault or a flaw in the definition of those who have gone before us, nothing, on the other hand, is more difficult than to propose one of our own which shall not also present a vulnerable side." (Dean Trench. See Burrill's Law Dict. *voce* Definition, and 2 Wooddes. Lect. 196.)

"The greater portion of all law business arises from the impossibility of giving absolute definitions for things that are not absolute in themselves." (Lieber's Civil Liberty, 23, *note*.)

Lord Campbell, in describing the effect of Fox's libel act, says it in effect defines a libel to be "a publication which, in the opinion of twelve honest, independent and intelligent men, is mischievous and ought to be punished." (5 Lives of the Chancellors, 350.) And by Lord Kenyon, "A man may publish anything which twelve of his countrymen think is not blamable, but he ought to be punished if he publishes that which is blamable." (Rex *v.* Cuthell, 27 How. St. Tr. 675.) These observations must be taken as applicable to criminal prosecutions.

CHAPTER II.

HOW ONE MAY AFFECT ANOTHER BY LANGUAGE.

Language can have no effect unless published—It must be true or false, commendatory or discommendatory—Must concern a person or thing—Its effect, direct or indirect, or both—Reputation.

§ 23. Language may exist as mere thought, but before it can have any effect extra the individual with or in whom it originated, it must be expressed; it must come into existence as an expression, by sound as in speech, or by sign as in writing or effigy; and not only must it be expressed, it must also be *published*—that is, communicated by the individual with or in whom it originated to some *other*.

§ 24. Language when employed to communicate ideas must assume the form of a proposition, or a series of propositions; by a proposition being meant, "discourse which affirms or denies something of some person or thing, the subject of the proposition." Every proposition is an assertion, and must be either true or false—that is, it must assert of its subject that which is true, or that which is false, and the assertion may be either of commendation or discommendation.

§ 25. Language must concern either a person or a thing, or both, and it may concern a person in his individual and natural capacity merely, or in some acquired or artificial relation or capacity as a trader, an office-holder, or as the author, owner, or possessor of some certain thing.

§ 26. The effect of the publication of language upon a person, other than the author or publisher of the language, must be direct or indirect, or both.

§ 27. Language cannot directly affect a thing; whatever direct effect it has must be upon a person. (§§ 130, 203.)

§ 28. Language, whether it concerns a person or a thing, may have a direct effect upon the person *to whom* it is published, but upon none other. It may directly affect the feelings, health, belief, or opinion of him to whom it is published, and it may influence or excite him towards a particular course of action or forbearance by himself, or in respect of himself or his affairs, or in respect of some other person or some thing, or the affairs of some other person. It may either please or displease him, or cause him to feel pleased or displeased with some other person or thing, or cause him to do some act or to abstain or resolve to abstain from doing some act to the advantage or disadvantage of himself or some other, or cause him to think better or worse of himself or of some other person or of some thing. That other person may be either he who makes the communication or he whom the language concerns. All the *direct* effects of the publication of language are personal to the individual to whom the publication is made, and can extend no further. The publication of language can have no *direct effects* other than those we have enumerated; whatever other effects may result from the publication of language must be *indirect* or consequent upon one or some of these enumerated direct effects.

§ 29. The kind of effect produced, *i. e.*, the direct or indirect effect, must be the same, whether the publication be by sound (speech) or by sign (writing or effigy), but

the mode of publication may affect the amount of effect produced.

§ 30. It is scarcely supposable that the publication of language which concerns another or his affairs can produce no direct effect, but it is easy to suppose that it may not produce any indirect effect. The publication may occasion a resolve (a direct effect), and that resolve may never be put into execution (produce no indirect effect); or it may occasion a change in the opinion entertained of another, and that other may never be otherwise in any the least degree affected by that change of opinion. The change of opinion may not prevent or occasion any action different from what would otherwise have been done or forborne. While, however, this is supposable, it is improbable; the possibility, however, of such an occurrence suffices for our purpose. Sometimes, indeed, the direct and indirect effects are apparent, and their extent ascertainable; and again, it may be that neither the direct nor the indirect effect is apparent nor its extent ascertainable.

§ 31. It is impossible to anticipate all the indirect effects which may result from the publication of language; experience has made us acquainted with some of them, and to these we shall have occasion to refer by way of illustration.

§ 32. Among the direct effects of the publication of language which we have enumerated is the occasioning the person to whom the publication is made to think well or ill of another. Now, what one thinks of another is the reputation of that other, and hence, when by language one is induced to think ill of another, the reputation of that other suffers disparagement.[1] That others think well of

[1] Reputation is the estimate in which an individual is held by public fame in the place where he is known. (Cooper *v.* Greeley, 1 Denio, 347. 365.) Character is conduct, it is independent of reputation. Character must be true, while reputation may be false. (Seely *v.* Blair, Wright [Ohio], 683.)

him is as gratifying to a man as that others think ill of him is distasteful, but their merely thinking well or ill of him by itself can neither benefit nor prejudice him. Unless in consequence of the opinion thus entertained, some act is done or forborne in reference to him or his affairs, which

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"Character is defined by Webster to be the peculiar qualities impressed by nature or habit on a person, which distinguish him from others; these constitute *real character*, and the qualities he is supposed to possess constitute his *estimated character or reputation*." (*Per* Welles, J., in Carpenter *v.* The People, 8 Barb. 608.)

Character is used by Bentham in the sense of "disposition," or rather of "reputation for disposition." (3 Jud. Ev. 190–192.) Character "is the particular moral quality, not necessarily as it absolutely exists, but as it *appears*, or has appeared to exist. It is the exterior of life which the party habitually wears, or has worn, in his intercourse with others, as it becomes, or has become, a subject of observation, inference and ultimate *opinion* on their part. It is the grade or point at which he stands *in their estimation* in that particular respect. It is, in short, his reputation among them of possessing the quality in question." (Burrill Circ. Ev. 2d ed. 527.)

"If the word reputation, when unqualified, does, *ex vi termini*, or in common parlance, mean general reputation—as we think it does—it is unnecessary to prefix the word general." (French *v.* Millard, 22 Ohio R. 50.)

"Reputation is thinking. I repute a man to be good or bad—that is, I think him to be so." (Maule, J., Doe *dem.* Padwick *v.* Wittcomb, 15 Jur. 778; 5 Eng. Law & Eq. Rep. 487.)

"The mere entry of something that was in a lease is not any expression of opinion or reputation." (Creswell, J., *Id.*)

"The words character and reputation are often used as synonymous terms, though in fact not synonymous." (Bucklin *v.* Ohio, 20 Ohio R. 18; French *v.* Millard, 22 *Id.* 50.)

"For a character and reputation of the above school." (School advertisement published in 1775. Notes & Queries, 7th, S. 11, 205.)

"Character is a term convertible with common report." (Kimmel *v.* Kimmel, 3 Serg. & R. 237, Gibson, J.)

"Character and reputation are the same." (*Id.* Duncan, J.)

"General character is the estimation in which a person is held in the community where he resides." (Marcy, J., Douglass *v.* Tousey, 2 Wend. 354.)

"Public opinion is the question in common cases where character is in issue." (Boynton *v.* Kellogg, 3 Mass. R. 192, Parsons, Ch. J.)

The word *character* has been variously used in legal proceedings, and sometimes denotes the personal, official, or special character in which a party sues or is sued as executor, officer, &c., but it more frequently refers to reputation or common report. (1 Cow. & Hill's Notes, 460, 1768; Leddy *v.* Tousey, 2 Wend. 352; King *v.* Root, 4 Wend, 113.) It is seldom used as synonymous with mere inclination or propensity, or even secret habit, nor is descriptive of the mere qualities of individuals, only so far as others have formed opinions from their conduct. (Safford *v.* The People, 1 Parker's Crim. R. 478.)

General character is the result of general conduct. (Sharp *v.* Scoggin, Holt's N. P. C. 541; 3 Amer. Law J. N. S. 145.)

Proof of general bad character—as that term is generally understood and used in society—does not necessarily and legally prove the fact that the witness's character for veracity is bad. (Gilbert *v.* Sheldon, 13 Barb. 627.)

"Chaste character" means actual personal virtue, not mere reputation. (Carpenter *v.* The People, 8 Barb. 603; Crozier *v.* The People, 1 Parker's Crim. R. 453: Safford *v.* The People, *Id.* 474.)

would not otherwise have been done or forborne, he is physically and pecuniarily in no wise better nor worse for such opinion. It cannot affect his person nor his property. In the ordinary course of events, some indirect effect does always result from the publication of language. The probability or improbability of any indirect effect resulting depends sometimes on the kind of language published, sometimes on the circumstances of the publication, and sometimes on both the kind of language published and the circumstances of the publication.

§ 33. We conclude, therefore, that there may be an injury to the reputation without, and independently of, an injury to the person or property, and that an injury to the reputation does not necessarily imply in every instance an injury to the person or the property.[1]

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[1] Domat Civil Law, Public Law, Book III, enumerates "defamatory libels" among private offenses, and in the same book, title 1, "of crimes and offenses," enumerates three kinds of "*goods*;" "the third is that good which is called *honor*, and which men value above all other goods." The author then proceeds to inquire what is signified by the term honor, and concludes, "lastly, it signifies reputation." Further on it is laid down that honor may be wounded, either by injurious treatment of the honor or by assaulting the reputation, for one may offend another's honor by actions or by opprobrious language without lessening his reputation, and we may blemish his honor by words, by writing, and other attempts against his reputation, or one may attack by one and the same way both the reputation and person of another. (*Post*, § 57.) A passage in Wycliff's "De Civili Dominio" is thus translated, Notes & Queries, 7th S. 1: 65: "It is untrue then that men, when they speak falsely, blacken the fame of a consistently good man, for that fame is written in the book of life, and the good man is 'a mirror unspotted.'"

CHAPTER III.[1]

RIGHTS; DUTIES; WRONGS; REMEDIES.

Description of Rights and Duties—Wrongs, Rights, and Duties undefinable—What determines of any act if it be a wrong—Remedies—Injunction—Original writs.

§ 34. Having in a preceding chapter [Ch. I] described slander and libel as wrongs, it is proper to explain what is meant by a wrong, and to that end we must briefly consider the nature of rights and duties. For the opposite to *a right* is not *a wrong*, but *a duty*.

§ 35. Rights and duties are neither persons nor things, but powers and obligations. A right is a power to do or forbear or require another to do or forbear. A duty is an obligation, a necessity to do or forbear, or to submit to some act of another. We hear of "moral and social duties of imperfect obligation,"[2] but there is no such thing as a *duty* of *imperfect* obligation; what is so denominated is really a right—a right which *should* be exercised—which, as in the case of all rights, the person in whom it is vested, may or may not exercise at his option. "Rights are universal and unexceptive, or, if not so, then they are none at all."[3]

§ 36. The object of a right or duty is a transaction. By transaction is meant an act, its occasion and its effect.

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[1] For the tenor of this chapter we acknowledge our indebtedness to the general part of "Thibaut's System of Pandekten Rechts," as translated by Lindley; also to Mr. Maine's admirable book, "Ancient Law, or an Inquiry into the Origin of Legal Ideas." As to rights and duties, reference may be had to Austin's Lectures on Jurisprudence.

[2] Harrison *v.* Bush, 5 El. & Bl. 344.

[3] Essay on Ultimate Civilization, by Isaac Taylor.

§ 37. Rights and duties are reciprocal. The act which one has the right, the power, to do or forbear, that act no other can or should hinder or compel the doing or forbearing; but to such doing or forbearing it is the duty, the necessity, of every other to submit; and what one has the right, the power, to command another to do or forbear, that it is the duty, the necessity, of that other to do or forbear; what it is the duty of one to do or forbear, that it is the right of some other to have done or forborne; what it is the duty of one to do, to that it is the duty of every other to submit.

§ 38. Rights and duties pertain solely to persons. A thing cannot have any rights and cannot owe any duties. And as a thing has no rights, a person cannot owe a duty to a thing.

§ 39. The exercise of a right is always optional; the performance of a duty is always compulsory. One may forego the exercise of a right, or exercise it, at his option, for either way no right of any other suffers; but one cannot, as his option, forego the performance of a duty; because to omit the performance of a duty is to take away a right somewhere, either in society or an individual—the right to have such duty performed. Therefore, every act done in exercise of a right is a voluntary [optional] act, and every act done in the performance of a duty is an involuntary [not optional] act. One may in fact perform his duties willingly, but as the performance or non-performance is not optional, and may be enforced, performance is properly regarded as involuntary.

§ 40. Rights must be exercised and duties must be performed strictly and in good faith.[1] (§ 88.) An act which exceeds the prescribed limits of a right is not the

[1] "A person may exercise a right in such a way that it becomes a wrong." (Lord Sidmouth quoted Popular Progress in England, 332. See § 91, *post*.)

exercise of that right, and an act which falls short of the prescribed limits of a duty is not the performance of that duty.

§ 41. Rights and duties cannot exist, nor have any certainty of existence, in the absence of a supreme power somewhere, which protects the exercise of the one and enforces the performance of the other; that supreme power is called law, and that branch of it which relates to the rights and duties of individuals in their social relations constitutes the municipal law. In *some* sense, therefore, it is proper to say that rights and duties are the *results of law*, and if this be granted, it must follow that all rights and duties of which the municipal law takes cognizance are legal rights and legal duties. There can be no such right recognized by law as a natural right. A right anterior to or independent of the law can be a right only of superior physical power.

§ 42. Every act must be done either in the exercise of a right or in the performance of a duty, or neither in the exercise of a right nor in the performance of a duty; and every act must be either such as the law permits and does not punish, or such as the law does not permit and will punish. Every act done in the exercise of a right or in the performance of a duty is a permitted act. Every act done neither in the exercise of a right nor the performance of a duty is an unpermitted act. Every act which the law permits is lawful, and every act which the law does not permit is unlawful.[1]

§ 43. A lawful act cannot amount to a wrong, but every unlawful act is a wrong; and as every act must be either lawful or unlawful, every act must be either a wrong or not a wrong. An act may be such as not to be obnox-

[1] By an unlawful act is meant *intentional* violence, without justification or excuse. (Hoar, J., Com'th *v.* Presby, 14 Gray [80 Mass.], 65.)

ious to *every* remedy, but if it is obnoxious to any remedy it is a wrong.[1] The rule that for every wrong the law provides a remedy, holds true only by postulating that only that act is a wrong for which the law provides *a* punishment or *a* remedy. The rule that for every wrong the law provides a remedy does not imply that for every wrong the subject of the wrong—the wronged can obtain redress, because sometimes although a wrong has been committed, the subject of the wrong is for some reason estopped from claiming redress. The formula by which this exception to the general rule is expressed is, that one cannot take advantage of his own wrong.

§ 44. Different laws prescribe different rules of right and duty, and where there are courts of different jurisdictions, that may be a wrong in one jurisdiction which is not a wrong in another; as where there are civil and criminal courts, and as in England when there were common-law courts and ecclesiastical courts. We may sometimes determine of any act whether or not it is a wrong, by inquiring whether or not the law provides for it *any* remedy or punishment. There can be no civil right where there is no remedy.[2] "It is a mockery to talk of existing rights without applying corresponding remedies."[3] If there is no remedy we conclude there is no wrong—meaning, of course, legal wrong. This, it must be conceded, is an illogical and inverse method of arriving at the desired conclusion, but we find it oftentimes resorted to, as the

[1] Injury is whatever is not done according to law. (Bracton, ch. xxxvi, p. 155.) There are hardships which the law cannot redress. (Swift *v.* Po'keepsie, 37 N. Y. 515–6.) An agreement not to permit the columns of a newspaper to be used for the publication of matter detrimental to the covenantee, held to be too vague to be enforced. (Fowler *v.* Hoffman, 31 Mich. 216.) In an unreported case against Walter Savage Landor, the author of Imaginary Conversations, &c., &c., one count in the declaration was upon the agreement of the defendant not to libel the plaintiff, and alleged a breach of that agreement.

[2] Bank of U. S. *v.* Owens, 2 Peters, 539.

[3] Fowler *v.* Lindsay, 3 Dallas, 413.

best attainable standard by which to determine of any act if it be a wrong.[1]

§ 45. Wrongs which only affect society in general, and so far as they affect society in general, are distinguished from wrongs affecting only individuals by denominating them *crimes*. Hereafter we shall invariably use the term *wrong* to signify an act injuriously affecting only individuals. Wrongs are direct or indirect. A direct wrong is where the act done may be *per se* a violation of a right—a blow is of this character. An indirect wrong is where the act done cannot be *per se* a violation of a right, and only becomes a violation of a right by reason of some consequence resulting from that act. The act of publishing language is of this character.

§ 46. We are accustomed to describe law as the supreme power in the State, commanding what is right and prohibiting what is wrong; but this, besides being untrue,[2] does not aid in determining what is a legal right or a legal wrong. So, too, a wrong is correctly enough described, not defined, as an invasion of a right, but unless or until we know what is a right, we cannot know when a right has been invaded.

§ 47. If we could catalogue rights, and distinguish each by an intelligible and unvarying definition, we should then have no difficulty in ascertaining when a wrong has been done. But the nature of a right forbids any such proceeding. We do, indeed, find text writers and judges speaking of the right of speech, the right of the press, and the right of property. Blackstone, and others following him, state that the *absolute natural rights* are the rights of life, liberty and reputation. Text writers also speak of *relative* rights and *tangible* rights, but all these are mere words,

[1] "The remedy may always be referred to as illustrating the right, and *e converso*." (Van Rensselaer *v.* Jones, 2 Barb. 656.)

[2] See Chisholm *v.* State of Georgia, 3 Peters' Cond. R. 74.

entirely illusory, capable of no practical application. The utmost that can be derived from all that has ever been written on this subject is, that a man has *some* rights pertaining to his person, his property and his reputation; the nature of a right is nowhere attempted to be defined or explained, except in the illogical way of stating a rule with a multitude of exceptions, leaving us in doubt as to each particular case which arises, whether it comes within the rule or is one of the exceptions.[1]

§ 48. While defining a wrong as an invasion, meaning every invasion of a right, text writers have contented themselves with speaking of the absolute right of property, the absolute right of reputation, &c.[2] Now, if the words "*absolute right of property*" have any meaning,

[1] In English Jurisprudence the chief purport of a principle seems to be to afford a nucleus for an enormous undergrowth of exceptions. The London Times, 16 March, 1880.

[2] "Rights of persons are divided into *absolute* and *relative*, 1 Chit. Pl. 137. This classification is recognized by all elementary writers. 2 Kent's Com. 129; 3 Bl. Com. 138." (Delamater *v.* Russell, 4 How. Pr. R. 235.) "The character of individuals is unquestionably one of their absolute and personal rights. It is, therefore, unnecessary to make any distinct affirmation that the protection of it most immediately falls within the common law. Reputation, indeed, is not only one of our perfect rights, but that which alone gives a value to all our other rights." (Holt on Libel, p. 15.) "The security of his reputation or good name, from the arts of detraction and slander, are rights to which every man is entitled by reason and natural justice." (1 Bl. Com. book I, ch. i.) "The use of the law consisteth principally in these three things: . . . . III. For preservation of man's good name from shame and infamy." (Bacon's The Use of the Law.) His Lordship says nothing further on the subject in that essay.

Slander or libel is an infringement of the *absolute* rights of persons. (Parker, J., Delamater *v.* Russell, 4 How. Pr. R. 235.) "Whether reputation be by the law of nature one of the *absolute* rights of persons or not, the common law of England does not so consider it. The law of unwritten slander is incompatible with it, and in part establishes a different principle. For it would follow from that principle, and he evidently means by it, that no man can lawfully say or publish anything to the disadvantage of another, even though it be true, and he is prepared to prove its truth." (1 Mence on Libel, 132.) Blackstone and others, translating *personæ*, person, instead of status or condition, place among the rights of persons the right of personal security, the reputation, &c., whereas the right to reputation is among the rights *in rem*. (Edinburgh Review, Oct. 1863, p. 239, Amer. Reprint.) The right which Blackstone styles the right of reputation is original or innate as opposed to acquired. This right has no connection with a natural right in the other sense of the term. Blackstone has confounded them, and, supposing the right of reputation to belong to the law of persons, has called it an absolute right of persons. (2 Austin's Lect. on Juris. 268, 476; 3 *Id.* 179; *post*, § 57.)

they must mean that one has such a right to his property that no one may, under any circumstances, take it from him; and if this be so, and every invasion of a right be a wrong, it must follow that *every* deprivation of property is a wrong. We know this is not true; one may be deprived of his property in many ways without a wrong being done. A man's property may be taken from him directly for public use, on making due compensation, or it may be taken from him to satisfy his obligations, and it may be indirectly taken from him in many ways by acts subjecting him to loss, for which the law affords him no remedy. So, too, if the supposed right to reputation be an absolute right, then every invasion of it must be a wrong; but reputation is often invaded without such invasion amounting to "a wrong," hence the inutility, for any practical purpose, of the definition of a wrong as an invasion of a right. The truth is, that a man has the right to the uninterrupted enjoyment of his property to such an extent only, and subject to such conditions, as the general welfare of the community demands, and so of reputation. It must be, therefore, that instead of saying of one he has an *absolute* right to property or reputation, we should say he has a right thus and so, describing it with such limitation and qualification as will make it true that every interference by another with such an enjoyment of it will amount to a wrong. This may be difficult, or it may be impossible; if the latter, as we conceive it to be,[1] let the attempt be abandoned, but it furnishes no

[1] "The time is passed when . . . . it was believed that everything was strictly definable, and must be compressed within the narrow limits of an absolute definition before it could be entitled to the dignity of a thorough discussion. The hope of being able absolutely to define things . . . . betrays a misconception of human language, which, itself, is never absolute except in mathematics. It misleads." (Lieber's Civil Liberty, 23.) Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is wiser, as suggested by Mr. Justice Miller, to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusive as the cases presented for decision should require. (Earl, J. Stewart *v.* Palmer, 74 N. Y. 191.)

reason for describing that as an absolute right which is something else. "It is difficult to say when night ends or day begins, or to draw the line between them, yet day and night are not the same thing."[1]

§ 49. It is not so proper to say that the law prescribes what is right and prohibits what is wrong, as to say that law determines rights by prescribing duties, and independently of any positive enactment, all legal duties are comprised in this one prohibition. *No one shall, without a legal excuse, do or forbear any act, by which doing or forbearing there results a breach of the peace, injury to the community, or damage to the person or property of another.*

§ 50. What determines of any given act whether or not it is permitted, *i. e.*, lawful; or unpermitted, *i. e.*, unlawful; whether there is or is not a legal excuse for the doing such act, is the *occasion* upon which it is enacted;[2] the occasion being the entire group of circumstances surrounding the act, including the actor, the patient or person acted upon, the kind of act, the manner of effecting the act, the motive of the actor, and the consequences of the act. It is the occasion to which we must, in every instance, refer to ascertain whether there was or was not a legal excuse for the act. Everything considered, was the act lawful or unlawful? Was it in exercise of a right or performance of a duty? As it is manifestly impossible to preconceive or anticipate every possible group of circumstances, so necessarily it is impossible to catalogue rights and duties—that is, to catalogue the acts which may or may not be done or forborne.

§ 51. The impossibility of framing such a definition of a right or of a duty as shall enable us to say of any particular

[1] Att'y Gen'l *v.* Daken, Law Rep. 2 Ex. 295.

[2] Hosmer *v.* Loveland, 19 Barb. 115.

act by itself, that it is lawful or unlawful, is evident. The utmost we can do is to say that an act done under a certain given state of circumstances is a permitted act, one the actor *had the right* to do, or that it is an unpermitted act, one the actor *had not the right* to do—that is, the doing of which it was his duty to forbear.

§ 52. The law, besides prescribing duties, provides the means called remedies for protecting rights and redressing wrongs. It will, in some cases, interpose by injunction to prevent the perpetration of a wrong, but, as a general rule, the publication of an alleged libel will not be stayed by injunction.[1]

§ 53. The ordinary mode of remedying a wrong is by an action. Actions were anciently commenced by original writ. These writs differed from each other according to the nature of the wrong to be redressed. These writs were preserved in the chancery in *The Register of Writs*, which register was printed and published in the reign of Henry VIII of England.[2] The most ancient writs provided for the most obvious kinds of wrongs, as nuisance, waste, trespass, &c.; but in the progress of society it seems that cases of injury arose new in their circumstances, and not within any of the writs then known, and that the power to issue writs of a new kind was conceived not to exist without the authority of the Parliament; accordingly, by the statute of 13 Edward I, ch. xxiv, called the statute of Westminster the IId (say A. D. 1285), it was provided "That as often as it shall happen in the chancery, that in one case a writ is found, and *in a like case* (*in con-*

[1] See *post*, Part II.

[2] One of the earliest refinements in forensic science was that of classifying the various subjects of litigation, and allotting to each class an appropriate *formula* of complaint or claim. Such was the practice in ancient Rome almost as early as the law of the twelve tables, and continued until the time of Constantine, who abolished the judicial *formulæ*. These *formulæ* in the English law were called *writs*. How, or when, or whence introduced into England, is undetermined. (Stephens' Pl. ch. i, and *Id.* appendix, note 2.)

4 Reeve's Hist. 426, 432. Original writs were abolished in England by statute 2 Will. IV, ch. xxxix.

similu casu) falling under the same right, and requiring like remedy, no writ is to be found, the clerks in the chancery shall agree in making a writ," &c. Under the sanction of this act, large accessions were made to the existing stock of original writs. These new writs were said to be issued *upon the case*, and the actions commenced by them were designated *actions upon the case*, or *actions of trespass on the case*. Among this class was the action of *trespass on the case for words*—the ancient form of the action—now known as the action of slander or libel, and which is the only *civil* remedy for slander or libel.[1]

§ 54. The consideration of the course of procedure in an action pertains more properly to a subsequent stage of our inquiry.[2] The rules by which we determine whether or not a wrong has been committed, and the rules of pleading, of evidence and of practice, although they have a certain interdependence, are in fact, and, if we would avoid confusion, must ever be regarded as separate and distinct.

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[1] Although the new writs were to be framed only *in consimilu casu*, "many writs were framed for various kinds of trespass unknown in former ages." (Sullivan's Lectures, Lect. 33; Stephens' Pl. 7.) The first reported action of trespass on the case is said to be found in 22 Edw. III, Ass. 41. (Reeve's Hist.) That would be A.D. 1349. We have not verified this statement, and doubt its correctness. The action an the case has its counterpart in the *actio utilis* of the Roman Law. (See 2 Austin's Lect. Jur. 303.)

[2] Part II, *post*.

CHAPTER IV.

WHAT IS THE GIST OF THE ACTION FOR SLANDER OR LIBEL.

History silent as to the introduction of the action for slander—Hypothesis necessary—How the law protects reputation—Fiction—Pecuniary loss the gist of the actions for slander and libel.

§ 55. It is not known with certainty, or, rather, all are not agreed, either as to the origin of the remedy by action for slander or libel, nor as to the gist of such an action, and neither history nor judicial decision furnishes any satisfactory solution of these questions. We know that all nations have recognized the capacity for injury inherent in language, and have provided some means for punishing offenses arising from an abuse of the gift of speech; but we seek in vain among these laws for a clew to the principles by which at this day we may determine when a wrong by slander or libel has been occasioned, and when we may properly invoke the remedy by action for slander or libel.[1] As the action of trespass on the case owed its

[1] After a reference to all available authorities on the subject of the ancient laws against offenses by language, and preparing a lengthy note on the subject, we conclude that however interesting as history, its publication here would not advance the object of this essay. The curious student may refer to Holt on Libel, ch. i, vol. II; 1 Mence on Libel, ch. viii, ix; Starkie on Slander; 3 Johns. Cas. 382; Wilkins' Leg. Anglo-Sax.; Lombard's Saxon Laws; Nicholson's Prefat. ad Leg. Anglo-Sax.; Stiernhook De Jure Vetusto Suconum et Gothorum; Tacitus' De Mor. Germ.; Saltern De Antiq. Leg. Brit.; Dugdale's Origines Juridicales; Disney's Ancient Laws against Immoralities; Gurdon's History of Court Baron and Court Leet; Petit's Leges Atticæ; Johnson's Institutes of the Civil Law of Spain; Michaelis' Com. on the Law of Moses, Smith's Translation; The English Statutes, 3 Edw. I; 2 Rich. II; 1 Phil. and Mary; 1 Eliz.; the publications of the English Record Commissioners; Pitcairn's Criminal Trials in Scotland. For seventeenth century ideas of the law of libel in Massachusetts, see Sketches of the Judicial History of Massachusetts; and among the Dutch in New York, see Valentine's Manual of Common Council for 1849, pp. 402,

origin to the provisions of the statute 13 Edward I, A. D. 1285, it seems necessarily to follow that the action of trespass on the case for words must date its origin at some period subsequent to that statute;[1] but it does not thence follow that anterior to the introduction of the action of trespass on the case for words, there existed in England no remedy for wrongs by language. We know that for centuries prior to the statute of 13 Edward I, offenses which we at this day designate slander and libel were recognized and punished; but of the time and manner of introducing the remedy by action of trespass on the case for words we know absolutely nothing. The reported decisions in the courts of law in England, printed and in manuscript, reach back at least so far as A. D. 1216, but we find in those reports no reference to an action for words earlier than A. D. 1321.[2] That decision merely serves to inform us that at that time existed the struggle for jurisdiction which probably commenced on the division of the courts into courts temporal and courts ecclesiastical or Christian, and which continued certainly until after the reign of the first James of England.

§ 56. As we can obtain no positive information on the subject of our inquiry, we are driven to hypothesis. Our

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421; and under English rule, Valentine's Manual for 1847, p. 359; and Thomas' Hist. of Printing in America. And see List of Authors following Table of Cases, *ante*.

[1] Section 53, *ante*, and note 2, p. 35, *ante*. Mr. Pomeroy, in his introduction to Municipal Law, says, § 199: That before the statute "there was absolutely no provision for a vast majority of the legal rights . . which are now the most common and important." And § 201: The effect of the statute "was to extend this action to cases where the injury was *consequential* or indirect."

[2] That case is in the year book of Edward II (Hil. 14 Edw. II, p. 416); it was an attachment upon a prohibition against proceeding in a court Christian for defamatory words. There is nothing in the report to indicate that it was a novel proceeding. March, in his Treatise on Slander, says he could find no action for scandalous words before Edward the Third's time, and only one such action during fifty years of that king's reign; three such actions during the reign of Edward the Fourth; not one in the reign of Henry the Seventh; and only five in thirty-eight years of Henry the Eighth. At page 5 he says: Actions for scandal are amongst the most ancient in the law.

unwritten law is based on the so-called common law of England, and whatever the number of sources which contributed to make up that complex, vaguely understood and imperfectly ascertained set of legal ideas denominated the common law of England, it is certain that so much of it as pertains to the rights of persons is mainly derived from the Anglo-Saxon and Roman civil laws. Of both of those systems of laws history furnishes us ample details. We know that Rome held possession of Britain from about the end of the first half century of the Christian era to about the middle of the fifth century (say from A. D. 45 to A. D. 448), and during this period Roman civil law was administered in England. When the Romans abandoned Britain, the Saxons became its masters, and, alternately with the Danes, so continued until the Norman conquest (A. D. 1066). The Saxons introduced their own system of laws. The controlling idea of those laws was the maintenance of the peace and protecting the person and property. They did not, nor does the law at this day, give *directly* any remedy for outraged feelings or sentiments.[1]

[1] See Tilley *v.* Hudson R. R. Co. 23 How. Pr. R. 370; Green *v.* Hudson R. R. Co. 32 Barb. 25; Lehman *v.* City of Brooklyn, 29 Barb. 234; Flemington *v.* Smithers, 2 C. & P. (N. P.) 292; Terwilliger *v.* Wands, 17 N. Y. 54; Wilson *v.* Goit, 17 N. Y. 442; Bedell *v.* Powell, 13 Barb. 183; Samuels *v.* Evening Mail Asso. 13 Sup. Ct. Rep. (6 Hun), 5; Salma *v.* Trosper, 27 Kan. 544. The cases to the contrary were overruled. But where there exists an independent cause of action, in that event injury to the feelings is an element of damage. Hamilton *v.* Eno, 16 Hun, 599; 81 N. Y. 122; Brooks *v.* Harrison, 91 N. Y. 83; Gulf R. R. Co. *v.* Levy, 17 Cent. L. J. 11. Mence, commenting on the statement of Holt, that the few actions for slander to be found in the earlier law reports was creditable to the people of those times, remarks that the credit was not due to the good manners but to the fact that "the common law took cognizance only of injuries to the person and property." (1 Mence on Libel, 333.) Perhaps among the reasons why there were so few actions for slander, one may be that the parties themselves undertook to redress the injury without resorting to the law. When King Harold required of Reidar, the Icelander, a blood fine for killing one of his (Harold's) followers, Reidar refused to pay it, because the man brought his death upon himself by behaving rudely to him. See Den Danske Erobring of England og Normandict; Copenhagen, 1863. In Baker *v.* Pierce (2 Ld. Raym. 960), Holt, Ch. J., said he remembered a story told by Mr. Justice Twisden, of a man who had brought an action for slander, who, on judgment being given against him, said if he had thought he should not have recovered he would have cut the defendant's throat. See Quigley *v.*

With few exceptions, these laws designed to remedy every wrong by a pecuniary mulct or fine (*were*)[1] proportioned and adjusted to the kind and degree of the wrong committed. In that form of trial which corresponded to our present jury trial, the question in Saxon times was only the guilt or innocence of the accused.[2] The penalty (the damages) was fixed by the codes. At a later period, after the Norman invasion, and when the Anglo-Saxon codes had been lost by desuetude, the courts fixed the amount of damages; this power, when jury trials assumed their present phase, appears to have been transferred by the court to the jury—the court, however, retaining its power to regulate the damages.[3] For ages the courts always revised the allowance by the jury of damages, and the power

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McKee, 12 Oregon, 22. The Jesuits sanctioned killing for slander, particularly for slander of one in religious orders, but they held that the killing should be secret, and not open, to create scandal. (Pascal Letters, xiii.) In the "Ethica Christiana," by Father Benedict Stattler, published in 1789, it is stated, paragraphs 1889, 1891 and 1892, that a Christian may, to prevent a "contumelia gravis certot provisa . . . aut calumnia" . . murder the "injusti aggresoris aut calumniatoris." Father Stattler's book was published "cum permissu superiorum," and is said to be still in use as a manual for ecclesiastics. See *post*, note to § 142.

The necessity of protecting character by law could not obtrude itself till society had begun to assume a complicated form. (Borthwick on Libel, 1.) The coarseness of language indulged in formerly must strike every student of history. Henry III (A. D. 1248) spoke of the Aldermen of London as "London Boors," applied a like epithet to the Bishop of Ely, and dismissed Bishop Aymer by telling him to go to the devil. See Miracles of Simon de Montfort and works of Roger Bacon.

[1] Damages correspond to the *Anglo-Saxon were:* 1 Palgrave's Rise, &c., Eng. Commonwealth, 205; Bosworth's Anglo-Saxon Dict. tit. *Were* and *Wite;* 2 Lappenburg's History of England (Thorp's Translation), 336.

[2] As to the origin of trial by jury, &c., see Forsyth's Hist. of Trial by Jury, and Stephen's Pl. Appendix, note 40; 2 Reeves' Hist. 270; Fortescue de Laudibus Legum Angliæ, ch. xxv, xxvi, xxvii, and notes to the edition by Amos; 2 Hallam's Middle Ages, 388-406, note, 11th edit.; Palgrave's English Commonwealth, 272.

[3] See Viner's Abr. tit. Damages, J, K, L, M, as to powers of courts to increase or mitigate damages. The right was denied in an action for slander, because there is in such an action nothing apparent for the judgment of the court to act upon. (*Id.* K.) See Cassin *v.* Delaney, 38 N. Y. 178; but in Gostling *v.* Brooks, 2 F. & F. 76, the court in bank upheld the verdict for the plaintiff, but reduced the amount of damages. The damages increased for giving plaintiff bad food to eat. (1 Rolle, 89.) And in cases of mayhem. (See Jacobs' Law Dict. tit. Mayhem; Rolle Abr. tit. Damages; 2 Sharswood's Blackstone's Com. 121, note, and the last note to § 293, *post*.

is still held and exercised by the courts, although at the present time it is customary to make the revision by either granting a new trial or ordering a reduction of damages, at the election of the party to whom damages have been awarded. The Anglo-Saxon[1] codes provide for offenses occasioned by language, but they are all offenses which amount to public wrongs or crimes, sedition, or treason, rather than private wrongs or torts. These codes are in fact barren of any provision of a pecuniary fine or penalty for a private injury by language. While the Saxons were yet dominant in Britain, Christianity, which had been early introduced into England and become extinct, was re-introduced through the Church of Rome—say A. D. 596. The introduction of Christianity did not abrogate the Saxon laws, but it at least supplemented upon them many precepts of Christianity, and, beyond a doubt, laid the foundation for the dictum that Christianity is part of the common law of England.[2] The clergy rose to great power in the

[1] Sir Francis Palgrave, in his "History of Normandy and of England," which unhappily he was not spared to complete, objects to the term *Anglo-Saxon* as a designation of the English of the ante-Norman period. He denies there was any Anglo-Saxon people or language, properly so called, and says: "If you had asked Alfred what he had in his hand, he would have answered it was an *Englisc-boc*. . . The name of our nation then, as now, was English." (Vol. iii, p. 631, edit. 1864.) Mr. Palgrave himself employs the term *Anglo-Saxon* in his earlier works.

[2] We do not intend to assert that Christianity *is* parcel of the English common law. Sir Matthew Hale, in Rex *v.* Taylor (Ventris, 293; 3 Keble, 621; Tremayne's Pleas of the Crown, 226), following Lord Coke, uttered a dictum that "Christianity is part of the laws of England." That dictum has been repeated in subsequent cases. See, among others, Rex *v.* Webster, Fitzg. 64; 2 Str. 834; Reg. *v.* Gathercole, 2 Lewin C. C. 237; Reg. *v.* Hetherington, 5 Jur. 529, Q. B.; Rex *v.* Paine, 1 East P. C. 5; Lindenmuller *v.* The People, 33 Barb. 548; Bedford Charity, 2 Swans. 527; Da Costa *v.* Paz, 2 Swans. 420, note; Atty. Gen. *v.* Pearson, 3 Mer. 399; Andrew *v.* N. Y. Bible & Prayer Book Soc. 4 Sandf. 157; 1 Bish. Cr. Law, §§ 945, 947; 2 *Id.* § 87. Jefferson, in a letter to Major Cartwright, controverts the dictum that Christianity is a part of the common law. This letter is commented upon in the Inaugural Discourse delivered by Joseph Story on taking the chair of Dane Professor at Harvard University, and in an article in 9 American Jurist; and see Life and Letters of Joseph Story, vol. I, pp. 430-434; vol. II, pp. 8, 462, 463; and on this subject see the arguments of Webster and Sergeant in the Girard will case; and Lewis on Authority in Matters of Opinion. Holt says Alfred made Christianity part and parcel of the common law. (Holt on Libel, 32.) See strictures on this dictum (1 Mence

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es in which money dam-
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ecclesiastical courts ap-
ompensation was sought,
poral courts; and where

Apostolical council at Jerusalem,
ed refers to the command, "As ye
ld that men should do unto you,
ye also to them;" adding, "from
one doom, a man may remember
he judge every one righteously,
needed heed no other doom-book."
The Puritan Colony of New En-
d resolved at a "General Court,
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e attended vnto in ordering the
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the reformation of the offender only was desired, then resort was to be had to the ecclesiastical courts. And where the ecclesiastical courts entertained jurisdiction of suits in which money might be demanded, the temporal courts restrained them from proceeding therein by the writ of prohibition. As there is now, so there must ever have been, a distinction between language occasioning pecuniary or temporal injury, and language insulting and provoking and harrowing to the feelings, without occasioning pecuniary or temporal injury. This distinction seems to have been clearly recognized by the statute *circumspecte agatis*,[1] and leads almost irresistibly to the conclusion that the gist of the action of trespass on the case for words, was the pecuniary loss, and not for the injury to the reputation—the defamation. In the early stages of society, only that language which put one in peril of punishment, loss of in-

[1] The statute thus styled was passed, 13 Edward I, stat. 4, ch. i, A. D. 1285. The King to his justices sendeth greeting: "Use yourselves circumspectly (*circumspecte agatis*) in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold pleas in courts Christian of such things as be *meer* spiritual . . . and for laying violent hands on a clerk, and in canons of defamation *it hath been granted already* that it shall be tried in a spiritual court when money is not demanded but a thing done for punishment of sin." By this it appears, said Lord Coke, that the cognizance of defamation was granted by act of Parliament. (2 Inst. 492.) See Appendix D. No. 11, to Ecclesiastical Com'rs Report, Feb. 27, 1832; and Stephens' Ecclesiastical Statutes, pp. 26-34. The statute, 9 Edward II. stat. 1, ch. iv, A. D. 1315, enacted: "In defamation, prelates shall correct also in manner above said, the King's prohibition notwithstanding." Dr. Hall, son-in-law of Shakespeare, in 1613, brought suit in the ecclesiastical court against John Lane for reporting that Mrs. Hall "had the runninge of the raynes and had been caught with Rafl Smith and John Palmer." The defendant was excommunicated. (Phillips' Outlines, Life of Shakspeare, 182.)

It seems of those *defamations* by which the party is *damnified* the spiritual court cannot hold plea. (Vin. Abr. tit. Prohibition, D, 5.) In Bacon's Abr. tit. Courts Ecclesiastical, D, it is said: "No suit can be instituted in an ecclesiastical court for defamatory words in writing, because they may be the subject of an action at law." (Comb. 71.) This, however, appears not to be correct. In Ware *v.* Johnson, 2 Sir Geo. Lee's Cas. in Eccl. Cts. 103 (A D. 1755), the words, "He keeps a whore in his house," were held to be defamation, and that whether the language was in writing or by parol. And see 2 Phill. Eccl. Cas. 106; Halford *v.* Smith, 4 E. 567; Bartlett *v.* Robins, 1 Wils. 258.

See Doctor and Student, Additions to the Second Dialogue—not in all editions of that work—ch. ix If it were enacted, that if one call another thief or murderer, that the suit should be taken thereupon to the King's court and not in the Spiritual court, I think the statute were good.

heritance, or of social companionship, was supposed to occasion pecuniary loss;[1] but as society progressed, as more faith and reliance had to be placed by men each in the integrity of the other, so increased the power to inflict pecuniary injury by means of language. The theory of the law being to redress all wrongs by a pecuniary fine; whenever it appeared that a pecuniary wrong was occasioned by language, there the temporal courts undertook to afford redress. It may be that at first, in all cases, in order to maintain an action for words in the temporal courts, it was necessary to prove a pecuniary loss; but those courts, by laying it down as a rule of evidence, that certain words *per se*, and without any further evidence, were proof of pecuniary loss, facilitated a resort to the temporal courts, and, by gradually extending the list of words which were regarded *per se* as evidence of pecuniary loss, so did those courts extend their jurisdiction. Thus, probably, originated the distinction between words actionable *per se* and words actionable only on proof of pecuniary loss by other evidence than the words themselves. It may be that originally the English law recognized no distinction between the effect of written and spoken words. When or why that distinction was introduced is unknown. Probably the desire of the temporal courts to enlarge their jurisdiction led them to adopt this distinction, for which they found some warrant in the Roman law.[2]

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[1] "It is said that formerly no actions were brought for words unless the slander was such as, if true, would endanger the life of the object of it. (Noy, 64; 1 Freem. 277.) But too great an encouragement being given by this lenity to false and malicious slanders, it is now held that for scandalous words of the species before mentioned (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust), an action on the case may be had without proving any particular damage to have happened, but merely upon the probability that it might happen. (3 Bl. Com. ch. viii.)

[2] See note, p. 12, *ante*. Daniel O'Connell, in 1834, proposed a bill in the English Parliament, intended, amongst other things, to assimilate libel to slander as to what language should give a right of action. See this bill commented upon, 11 London Law Mag. 432.

§ 57. We attempted to explain in Chapter II, the difference between an injury to reputation and an injury to property; and to show that an injury to the reputation did not necessarily imply an injury to the person or property. In Chapter III, we undertook to show that reputation was not an *absolute right*, and in the preceding portion of this chapter we have attempted to show that the temporal courts of common law recognized only injuries involving pecuniary or temporal loss. It nowhere appears that the temporal courts recognized any right to reputation, and it is entirely consistent with all our knowledge of the law to assert that, *in theory* at least, the temporal courts of England never did, and, as the law in this respect has not been changed, they do not now, otherwise than inferentially, recognize reputation as a right which the law protects. And if this be so in England, then is it so in the United States. When we consider that by common law "falsely and maliciously to impute, in the coarsest terms and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be maintained for saying that a cobbler is unskilled in mending shoes, or that any one has held up his hand in a threatening posture to another,"[1] it would seem to need nothing more to satisfy the most skeptical that the protection is to the property, and not to the reputation. Notwithstanding some adverse criticism upon the statement, we conclude to repeat as law, that pecuniary loss to the plaintiff is the gist of the action for slander or libel.[2] If the language

[1] Report of Committee of House of Lords on Defamation and Libel, July, 1843.

[2] Odgers Libel, 18–21. If we have not succeeded in establishing this view by what we have already written, we cannot hope to do better in a note, we therefore leave our work to be our answer to our critic.

published has not occasioned the plaintiff pecuniary loss (actual or implied), then no action can be maintained.[1]

[1] A note to the "Preliminary Discourse" to the American edition of Starkie on Slander, after referring to the Roman law as making *personal contumely and insult* the essence of the offense of slander, adds: "This, it will be seen, is a circumstance which constitutes a very essential and characteristic distinction between the law of England and that of Rome, and of those countries which have adopted the civil law; . . . . for the law of England has from very distant times considered the *temporal injury* to a man's estate, and not the contumely or insult of the agent as the ground of compelling reparation in damages." (Prelim. Disc. vii.) "There must be some certain or probable temporal loss or damage to make words actionable." This was said of *oral* words by De Gray, Ch. J., in Onslow *v.* Horne, 3 Wils. 177, and this was approved by Lawrence, J., in Holt *v.* Scholefield, 6 T. R. 691. And *per* Bayley, J., in Whittaker *v.* Bradley, 7 D. & R. 649: "The principle on which this species of action [action for saying orally plaintiff, an innkeeper, was a bankrupt] is, that the slander has the effect of producing *temporal* damage to the party complaining." To maintain the action there must be *injury* to the plaintiff. (Ellenborough, Ch. J., Maitland *v.* Goldney, 2 East, 426.) An action on the case is not maintainable in any case without showing especial prejudice. (Lowe *v.* Harwood, Cro. Car. 140; S. C. Palmer, 529; Ley, 82.) See in note to § 198, *post*.

Reputation or fame is under the protection of the law, because all persons have an interest in their good name, and scandal and defamation are injurious to it, though defamatory words are not actionable otherwise than as they are a damage to the estate of the person injured. (Wood's Ins. 17; Jacob's Law Dict. *voce* Reputation or Fame.) An action on the case lies for words and for deeds. For words spoken to or concerning another, whereby one is defamed and damnified. (Wood's Ins. 535.) "One essential ingredient of a good cause of action for defamation is damage." (Channell, B., Foulger *v.* Newcomb, Law Rep. 2 Ex. 330.) Reputation is property. (Dixon *v.* Holden, Law Rep. 7 Eq. 492.) This case was not followed. See Injunction to restrain publication of a libel. Part II, *post*.

"In England, by the common law, defamatory words are not actionable otherwise than as they are a damage to the estate of the person injured." (Wood's Civil Law, 244, *note*.) "I am not certain," says Lord Kames, "that in England any verbal injury is actionable, except such as may be attended with pecuniary loss or damage. *If not, we in Scotland are more delicate.* Scandal, or any imputation upon a man's good name, may be sued before the commissaries, even when the scandal is of such a nature that it cannot be the occasion of any pecuniary loss. It is sufficient to say, I am hurt in my character." (Historical Law Tracts, p. 225.)

"The party injured [by libel] may no doubt bring an action on the case. This process, however, is not competent unless it is grounded on an actual loss, which must be shown to have been sustained" (Borthwick on Libel, 4.) In Boldroe *v.* Porter, Yelv. 20, the declaration alleged *per quod* the plaintiff was in danger to lose her goods and life. In Edward's Case, Cro. Eliz. 6, held the charge actionable, and assigned as the reason, that "*by such speech the plaintiff's good name is impaired.*" In Button *v.* Heywood, 8 Mod. 24, Fortescue, J., observed: "It was the rule of Holt, Ch. J., to make words actionable whenever they sound to the *disreputation of the person* of whom they were spoken; and this was also Hale's and Twisden's rule, and I think it a very good rule."

"I will cite rights to forbearances merely. A man's right or interest in his good name is a right which avails against persons as considered generally and indeterminately. They are

Let us not be misunderstood. We concede all that can be urged as to the value of a "*good reputation.*" We believe, with Lord Bacon, that "men's reputations are tender things, and ought to be like Christ's coat, without seam."[1] And "who can see worse days than he that, yet living, doth follow in the funeral of his own reputation?" We do not intend to deny that the law does in fact, and to a great extent, protect reputation; but we desire to be understood as insisting that, where the law does protect reputation, it does so indirectly, by means of a fiction—an assumption of pecuniary loss. In theory, the action for slander or libel is always for the pecuniary injury, and not for the injury to the reputation.[2] There are many such fictions introduced into the administration of the law, by means of which, without changing the rule of law, the law is, in effect, changed.[3] When this is the case, this difficulty arises: Shall the rule be stated as it is in theory or as it is in effect? and then this further difficulty that these two phases of the same rule are sometimes stated as two dis-

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bound to forbear from such imputations against him as would amount to injuries towards his rights in his reputation. But though the right is a *real* right, there is no subject, thing or person over which it can be said to exist. If the right has any subject, its subject consists of the contingent advantages which he may possibly derive from the approbation of others." (2 Austin's Lect. Juris. 51.) Right to reputation may be classed with property. It is a right to the chance of the favorable opinion and the good offices of others. There is no obligation to do me good, but an obligation to forbear from lessening the chances of deriving good from voluntary service, &c. (2 *Id.* 479, and 3 *Id.* 179, 184.) The basis of the action is damages for the injury to character in the opinion of others. (Kent, J., Lyle *v.* Clason, 1 Caines, 583.) The gravamen in an action of slander, is social degradation. (Henderson, J., Shipp *v.* McCraw, 3 Murphey, 466.) Certainly the gravamen of an action for slander or libel concerning a corporation, is nothing more than its pecuniary loss. (§§ 262, 263, *post.*)

[1] Lord Bacon's charge against Lumsden. Good reputation has ever been, as it is now, of great value as a shield against imputation of crime; by a law of William the Conqueror, if a man of good reputation was charged with theft, he might clear himself by his single oath. (Leges Gul. Conq. 14. in the Ancient Laws and Institutes, published by the English Record Commissioners. See Anthon's Law Student, Thesis X: Character, how far a Universal Shield. Also, McNally's Crim. Ev. 573.)

[2] The New York Code of Civ. Pro. § 3343, defines personal injury to include Libel, Slander, and Malicious prosecution.

[3] See Maine's Ancient Law, 26, and Bryant *v.* Foot, Law. Rep. 2 Q. B. 181.

tinct rules, and the rule being stated sometimes one way and sometimes the other, creates confusion and apparent contradiction. It may be practically the same thing, whether the remedy is given by law for the injury to the reputation, or for the pecuniary injury by means of an attack on the reputation ; but in reasoning on this, as on any other subject, it makes all the difference whether we start with a true proposition or a false one. With a false premise we *may* arrive at a conclusion which is true ; but under such circumstances, we can never be sure that our conclusion is true.

§ 58. Among the fictions referred to in the last preceding section, perhaps the most noticeable, and the one which best illustrates our meaning, is that by which more than nominal damages are recovered by a parent for the seduction of a daughter. At the present day, no lawyer doubts that at common law an action could not be maintained for the seduction of a daughter, merely as a daughter, nor merely for the seduction. But at common law, to deprive one of the services of his hired servant gave a cause of action, because it occasioned a pecuniary injury. The common law gave a parent a right to the services of his minor children ; then, in order to afford a remedy for seduction, which was not contemplated by the common law, the daughter is styled servant, and the remedy is given in theory, not for the grief and shame of the seduction, but because, by means of the seduction, the servant was the less able to perform the services required of her, and the parent thereby sustained a pecuniary loss.[1] This was the first step ; and where the daughter was, in fact, one of the parent's household, the change from the *status* of daughter

[1] There can be no doubt that the law is as above stated (Knight *v.* Wilcox, 14 N. Y. 413); and yet it is but candid to say that there are *dicta* to the effect that the mortification and disgrace and wounded feelings constitute the *gravamen* of the action. (See Badgley *v.* Decker, 44 Barb. 577, and cases there cited.)

to that of servant was easy enough. The next step was where the infant daughter was not in fact one of the parent's household, but was in the service of another, by her own contract, and not by the contract of the parent: then the action was allowed on these grounds: the daughter, being an infant, could not lawfully contract for her services, therefore the parent could at will rescind the contract, and take the daughter to the parental service; but if the parent did so, the servant would be less efficient, and so a pecuniary injury might or did result. The next and final step thus far is, that where the infant daughter was, by the contract of the parent, the servant of another, still the action can be maintained if the seducer by his fraud had procured the making of the contract, and this on the ground that the fraud vitiated the contract, and leaves the parent an option to reclaim the daughter's services.[1]

§ 59. By processes similar to those detailed in the last preceding section it has come to pass that the remedy for injuries by language, in theory given only to redress a pecuniary loss, is now applied to and embraces cases in which no pecuniary loss is or can be shown to have occurred. The process by which this result has been arrived at is by adopting the rule of evidence above referred to (§ 56), that certain language is *per se*, and without other evidence, conclusive proof of pecuniary loss; this, however, is only a rule of evidence, and the rule of right remains intact—that a pecuniary loss must be shown to entitle to a remedy. That the rule is so is demonstrated by the case of words to which the rule of evidence just referred to does not apply, or to words which are said not to be

[1] See Lipe *v.* Eisenlerd, 32 N. Y. 229; White *v.* Nellis, 31 N. Y. 405; Dain *v.* Wyckoff, 18 N. Y. 45; s. c. 7 N. Y. 191; Mulvehall *v.* Milward, 11 N. Y. 343; Bartley *v.* Richtmeyer, 4 N. Y. 38; Knight *v.* Wilcox, 14 N. Y. 413; Harper *v.* Luffkin, 7 B. & Cr. 387; 1 M. & R. 166. This last case is a noticeable instance of how far courts will in effect depart from the rule of law, while they uphold it inthe letter.

actionable *per se*—that is, which are not *per se* evidence of pecuniary loss. As to these, it has never been doubted that a pecuniary loss must be shown to entitle the plaintiff to a remedy.[1]

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[1] Beach *v.* Ranney, 2 Hill, 309; Herrick *v.* Lapham, 10 Johns. 291; Hallock *v.* Miller, 2 Barb. 630; Hersh *v.* Ringwalt, 3 Yeates, 508. "The real foundation of the action [for libel] is the right to recover pecuniary satisfaction." (Viele *v.* Gray, 10 Abb. Pr. R. 7.) The special damage must be of a pecuniary nature. (Beach *v.* Ranney, 2 Hill, 309.) And see *ante*, note to § 57, and *post*, note to § 72; Heard on Libel, ch. v, § 54; Kelly *v.* Partington, 3 Nev. & M. 116; 5 B. & Ad. 645; Keenholts *v.* Becker, 3 Denio, 346; Foulger *v.* Newcomb, Law. Rep. 2 Ex. 330; Terwilliger *v.* Wands, 17 N. Y. 62; Wilson *v.* Goit, 17 N. Y. 444; Roberts *v.* Roberts, 33 Law Jour. Q. B. 250.

CHAPTER V.

WRONGFUL ACTS.—ELEMENTS OF A WRONG.

Wrongful acts—Liability—Presumptions of law—Questions of law and fact—Essential acts in slander and libel—Defamatory—Falsity—Voluntary—Involuntary—Intention—Malice.

§ 60. Although we are unable to predicate of any act *per se* whether or not it is *a wrong* (§ 51), we may, at least as to some acts, determine of them *per se* whether or not they are *wrongful.*

§ 61. An act is wrongful which, as a necessary or as a natural and proximate consequence, occasions hurt of body or pecuniary loss to another than the actor.[1] When the necessary consequences of the act *must* be hurt of body or pecuniary loss, then the act is patently wrongful, or wrongful *per se.* When the act is one the consequences of which are not necessarily hurtful to the person or property of another, but is an act the natural and proximate consequences of which *may* occasion hurt to the person or property of another, then it is latently wrongful. It is wrongful, provided that as a natural and proximate consequence there ensues personal hurt or pecuniary loss to another. One and the same act may occasion harm to the person and loss of property to another, and either by its necessary or its natural and proximate consequences, or

[1] Bonomi *v.* Backhouse, 9 Ho. Lords Cas. 503; Smith *v.* Thackerah, Law Rep. 1 C. P. 566. It is said there is a distinction between an action for a wrong and an action for negligence. Dickinson *v.* Mayor of N. Y. 92 N. Y. 588.

both. It is not always easy to determine what are necessary and natural and proximate consequences, and to distinguish them from those which are not necessary, not natural, or not proximate (*remote*) consequences. The rules for making this determination and distinction will be hereafter considered. We have here but to remark that the necessary, natural and proximate consequences of an act are those of which alone the law takes cognizance, and these it is which constitute in legal phraseology damage or injury. Any consequence which is neither necessary nor natural and proximate is disregarded in law.

§ 62. No act but a wrongful act can become a wrong. In the absence of any excuse for it being shown, every wrongful act is *prima facie* a wrong. It is a wrong provisionally or conditionally; that is to say, it is regarded for *all purposes* as a wrong, unless and until a legal excuse for the doing it is shown. That which does not exist and that which is not shown to exist are the same. A legal excuse not shown to exist is the same as though no legal excuse existed. The burden of showing the existence of a legal excuse or a defense is always upon the doer of the wrongful act.

§ 63. The theory is that anything which must be shown to establish a legal excuse or a defense is no part of the essential element of a wrong. In practice, to entitle to a remedy, it is required only to show a wrongful act done, and nothing more appearing, the right to the remedy follows as of course. Reason and expediency alike demand that in this respect the theory should correspond to the practice.

§ 64. Legal excuses are of two kinds—such as constitute an absolute defense and such as constitute a conditional defense. A legal excuse of the latter kind is a defense, until some additional fact is shown which takes

from it the character of a legal excuse. The legal excuse that the language was spoken by a judge as such (§ 227), or by a witness as such (§ 223), is of the first or absolute kind. The legal excuse that the language was published to one who was interested to know it, and with a belief that it was true, is a legal excuse of the second or qualified kind (§ 241). The excuse exists only provided it does not appear that the language was published not believing it to be true, or published to one not interested to know it.

§ 65. There is this distinction between *legal excuse* and defense. Legal excuse is such a state of facts as prevents a wrongful act amounting to a wrong. Defense includes legal excuse and more, namely, those cases in which the wrong is admitted to have been done, but where, from some circumstance, such as the statute of limitations, or satisfaction, or in the action for libel the truth of the language published, the plaintiff has forfeited or waived his right of action.

§ 66. The question what constitutes a wrong or when has a wrong been committed, and the question who is liable therefor, are essentially distinct questions, and to be determined by different rules.

§ 67. As regards liability, no one is responsible for involuntary acts,[1] nor for any other than *wrongful* acts

[1] A man must will an act before he can be responsible for it. (Wood's Civil Law, 18.) No action lies for an inevitable accident. (Harvey *v.* Dunlop, Hill & Denio Sup. 193; see Center *v.* Finney, 17 Barb. 94; affi'd, 2 Selden's Notes, 44.) No man is liable civilly or criminally for a purely accidental mischief, that is to say, for the consequences of an act not his own which he was unable to foresee, or, foreseeing, was unable to prevent. (2 Austin's Lect. Juris. 165, 167.) If there had been any *necessity* for the defendant's conduct, it would have been matter of defense. (Ld. Ellenborough, Rex *v.* Vantandillo, 4 M. & S. 73; Reg. *v.* Hicklin, Law Rep. 3 Q. B. 376.) The act must be intentionally done, the meaning of which is, that the defendant should know what he published, for, as in the case put by Starkie, if a servant should deliver a sealed letter containing the defamatory matter, without knowing its contents, he would not, though the actual in-

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act with a guilty intent, he is not
agent of any one. If he does it
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is the agent of that person; and if
have agreed to employ him, he is
agent of both. (Alderson, B., Reg.
Bull, 7 Law Times, 8; and see Mo-
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De Groot, 15 How. Pr. R. 314, and
ost, §§ 265–7.) The acts of an attor-
y at law, in carrying out the instruc-
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ceptions to the rule stated in the
ext. (See 34 Alb. L. J. 479, and *post*,
te to § 122.) "There is a great
stinction between the authority
hich will make a man liable crimi-
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ake him liable civilly." (Byles, B.,
kes *v.* Prescott, L. R. 4 Ex. 169–
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[2] See *post*, Publisher.

[3] See *ante*, note to § 67, and *post*,
blisher, § 121.

its consequences, not for the intent. By the law of England, intent alone, without any overt act, may constitute treason; with this exception, there is no case in which intent alone, without an act, can constitute a wrong. The *prima facie* liability for the commission of a wrongful act can be avoided only by showing some defense or lawful excuse. Showing the act to have been done with a good intent would not of itself, in any case, constitute a defense or lawful excuse. The consequences of an act are incidents to the act, and inseparable from the act. Liability for the one is inseparable from liability for the other. The usual ground upon which this liability for the consequences of an act is placed is, that the law presumes every one to intend the necessary and natural consequences of his acts.[1] The phrase, *the law presumes*, is objectionable. The law does not presume.[2] It is customary to say that the law presumes every one innocent; every one of good repute; every wrongful act to be malicious; every one to intend the consequences of his acts, &c. But it is not so. If

[1] The law presumes a person to intend the injury his acts are calculated to produce. (Haire *v.* Wilson, 9 B. & Cr. 643; Viele *v.* Gray, 10 Abb. Pr. R. 7, and a series of dicta.) A man is as much answerable for the probable consequences of his act as for the actual object. (Rex *v.* Moore, 3 B. & A. 184.) "It is a universal principle that, when a man is charged with doing an act (that is a wrongful act without any legal justification) of which the probable consequences may be highly injurious, the intention is an inference of law resulting from the doing the act." (Rex *v.* Dixon, 3 M. & S. 15; cited Reg. *v.* Hicklin, Law Rep. 3 Q. B. 375.)

[2] We are not unmindful of the fact that the books are full of such expressions, as the law presumes, presumption of law, &c. But the phrase is objectionable and should be reformed. Burrill says, the presumption is rather an assumption. (Presump. Ev. 10, 43; and see 6 Lond. Law Mag. 354.) The inference, for it is absurd to call it a presumption. (Stephen's Crim. Law. 182.) "Presumptions of fact are but inferences drawn from other facts." (Mason, J., O'Gara *v.* Eisenlohr, 7 Trans. App. 317.) Distinction between presumption of evidence and presumption of law, see The People *v.* McCann, 16 N. Y. 66; Powell *v.* Cleaver, 2 Brown Ch. R. 499. Presumptions are not based on the supposition that the fact presumed exists, but because the policy of the law requires such a presumption. (Doe *v.* Earnhart, 10 Ired. Law Rep. 516.) Presumption "is the inference of one fact from another." (Duncan *v.* Little, 2 Bibb, 426.) Counsel: It must be assumed that the trustee will do his duty. Pollock, Ch. B.: We must assume nothing either way, but he may not. (Bulnois *v.* Mann, Law Rep. 1 Ex. 30.) The presumption that every one is bound to know the law has no foundation in fact. (Judge Taney, Blackwell's Tax Titles, 575, note.)

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R. 428, note), Lord Mansfield mis-
ted the above lines as thus:

For twelve honest men have decided the cause,
Who are judges of facts, though not judges of laws.

The author was Mr. Pulteny, and
y were written on the occasion of
failure of the prosecution against
he Craftsman." (See 21 State

on questions of fact.[1] (1) By determining whether or not the evidence adduced tends any way to prove the fact in issue; whether there is *some* evidence or *no* evidence. (2) By deciding in some cases that certain established facts warrant or do not warrant certain inferences, and requiring the jury to accept such inferences as proved. (3) By deciding what evidence is to be regarded, and what disregarded, whether as going to prove or disprove a fact, or to affect damages. (4) By granting new trials when they deem the verdict as contrary to or as against evidence, or the damages excessive or inadequate. The connection between one fact and another, as cause and effect, is always a question of fact. It is the degree of probability of such connection which leads courts to determine whether they decide the question, or whether they leave it to the jury to decide. (1) If one event is very generally the cause of a certain other event, the courts lay down the general rule that the proof of the one event is the proof of the other, and do not allow juries to decide contrariwise. (2) If one event is often but not so generally the cause of a certain other event, then the courts leave it to the jury in each case to decide whether or not in that particular case that certain other event has followed.

The necessary consequences of an act always follow the act, and therefore the courts pronounce it a rule of evidence that the proof of the act is proof of its necessary

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Trials, 847, 1046; 17 *Id.* 625; Forsyth's Hist. of Trial by Jury, 272; Popular Progress in England, 89; 2 Political Ballads of 17th and 18th Centuries, by Wilkins; Lord Campbell, Lives of the Chancellors, Vol. VI, p. 176, Life of Lord Hardwicke.)

[1] The judge put back the jury twice because they offered their verdict contrary to the evidence. (Clayton, 50.) Instances of judges taking questions of fact out of hands of jury. (Wright *v.* Orient Mut. Ins. Co. 6 Bosw. 269; Wells *v.* Com. Mut. Ins. Co. 46 Barb. 413; Clarke *v.* Rankin, 46 Barb. 571, and numerous cases.) Juries are *assistants* to the courts in determining *some* issues of fact. (Forsyth's Hist. Trial by Jury.) "Actions are not tried by juries, they try only issues." (Bramwell, J., Collins *v.* Welch, L. R. 5 C. P. Div. 27.) In Vermont, *by statute*, the courts are forbidden to grant new trials because they differ from the jury as to the weight of testimony. (Stearns *v.* Howe, 12 Vt. 579.)

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language as by a necessary or natural and proximate consequence occasions pecuniary loss to him whom, or whose affairs, it concerns. It is scarcely conceivable that any other than discommendatory language can by a necessary or natural and proximate consequence occasion damage; it may therefore not be improper to say that the language must be defamatory, but that alone does not express so much as is implied in the requisite of occasioning *damage*. We shall hereafter have occasion to advert to this subject more in detail.[1]

§ 73. To constitute a slander or libel, must the language be false? If the language is true, it is a defense;[2] but it does not thence follow that falsity is an essential element of the wrong. We know that the fact of the language being true is not alone an answer to a prosecution for a libel as a public offense; the fact, then, of the language being true does not prevent its amounting to a wrong (§ 43). To say that showing the truth of the language published is a defense, and to say the language must be false, are not identical propositions. It may be correct to say one has the right to *speak* the truth,[3] but it is not correct to say one has the right to publish the truth by writing (§ 43). In certain cases, as will hereafter be explained, a cause of action for slander or libel cannot be

[1] "But if the matter was not in its nature defamatory, the rejection of the plaintiff cannot be considered the natural result of the speaking of the words. To make the speaking of the words wrongful, they must in their nature be defamatory." (Patterson, J., Kelly *v.* Partington, 5 B. & Ad. 645; 3 Nev. & M. 116; and to the same effect see Vicars *v.* Wilcocks, 8 East, 1; Ashley *v.* Harrison, 1 Esp. 48; Peake, 194.) "We cannot have a definite idea of a design to injure unconnected with some degree of probability that the means made use of would effect the design." (Durham *v.* Musselman, 2 Blackf. 99. See § 179, *post*.)

[2] "The truth of the supposed slander is in effect a ground of justification, which must be substantiated by the defendant." (1 Starkie on Libel, 9.) To maintain the action, the words should be untrue. (Ellenborough, Ch. J., Maitland *v.* Goldney, 2 East, 426.)

[3] "Our laws allow a man to speak the truth, although it be done maliciously." (Bronson, J., Baum *v.* Clause, 5 Hill, 199; and to the like effect, Foss *v.* Hildreth, 10 Allen, 76.)

shown without alleging the language to be false; but in the ordinary case of language concerning the person, no allegation of falsity is required to show a cause of action. In the latter instance the allegation of falsity is not necessary in a civil action, nor even in a criminal prosecution.[1] But where, as often happens, the language is alleged to be concerning the person and also concerning the affairs, then the allegation of falsity becomes material. The approved precedents of pleadings all contain the allegation of falsity, and thus, probably, falsity has come to be regarded as essential to the wrongs and to the descriptions of the wrongs slander and libel.

In those cases in which falsity must be alleged to show a cause of action, then the language cannot, as a necessary or natural and proximate consequence, occasion a pecuniary loss unless it is false; *in such cases, therefore, if not in every case*, the requirement that the publication must, as a necessary or natural and proximate consequence, occasion pecuniary loss, includes the requirement that the language be false. As will appear hereafter, where the language is concerning the person, the plaintiff is not allowed in the first instance, nor, except to disprove a defense of truth, to give any evidence of the falsity of the language published.[2]

§ 74. To constitute a slander or a libel, must the publication of the language be with malice or maliciously? To answer this question it is material to inquire *what is malice, and what is meant by the term malice as used* in the textbooks and the reports.[3]

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[1] Rex *v.* Burke, 7 T. R. 4; and if falsity is alleged, it cannot be traversed. (Lewis *v.* Allcock, 3 M. & W. 188; 6 Dowl. Pr. C. 389; and *post*, § 328.)

[2] Starkie on Libel, 59; Stuart *v.* Lovell, 2 Starkie's Cas. 93; § 388, *post*.

[3] How much bad law and bad philosophy of law have arisen from imperfect comprehension of the terms will, motive, intention and negligence, may be seen in the nonsense of English law writers concerning malice. (Edinburgh Review, Oct., 1863, p. 230, Amer. reprint.)

§ 75. We have seen that every act must be lawful or unlawful (§ 42). Lawful, such as has a legal excuse; unlawful, such as has not a legal excuse. Acts done without lawful excuse are said to be done with malice or to be malicious acts. All acts, must be either voluntary or involuntary.[1]

§ 76. A voluntary act is an act done under no legal or other obligation to perform it, and which the actor may do or forbear at his option; as an act done in the exercise of a right. An act done with a consciousness or knowledge of the character of the act, or under such circumstances as that the actor ought to know, and by the exercise of a degree of care proportionate to the exigences of the occasion the actor might know, the character of the act. A voluntary act does not mean a mere act of volition, but an act of volition coupled with a means of knowing the character of the act about to be performed, and an intention to do that very act.[2] It is the act sometimes called an intentional act. Every act is *prima facie*, and without more, a voluntary act; it is regarded for all purposes as a voluntary act unless and until it is shown to be involuntary.[3]

§ 77. An involuntary act is an act done under circumstances which permit to the actor no option as to whether he will do or forbear the act; an act done under some legal obligation to perform it as an act done in discharge of a duty; an act done under duress; an act done uncon-

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[1] "I purposely abstain from the use of the words *voluntary* and *involuntary*, on account of the extreme ambiguity of their signification. By a voluntary act is meant sometimes an act in the performance of which the will has had any concern at all—in this sense, it is synonymous to '*intentional*'—sometimes it means uncoerced, and sometimes spontaneous." (Bentham's Principles of Morals and Legislation, 22, 79, 81, and see 2 Austin's Lect. Juris. 88.)

[2] "An act of the will is the same as an act of choosing or choice." (Edwards on the Will, pt. 1, § 1; commented on, Hazard on the Will, 177.) As to the will and intention, see Stephen's Crim. Law, 76.

[3] "Men do not act wholly without motive." (Woodruff, J., Kenedy *v.* The People, 39 N. Y. 254.)

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the cases in which there exists any intent to do more than commit the act itself, the intent may be either to produce all or some of the consequences of the act, or to produce an effect not a consequence of the act done. As one is responsible only for the necessary and natural and proximate consequences of his acts, at least any intent to produce any other consequence or effect must be immaterial. If the intent is at all material, it must be the intent to produce the necessary and natural and proximate consequences of the act.

§ 81. The various kinds of intents with which an act may be done are all resolvable into two classes: (1) an intent to injure some one; (2) an intent to benefit some one. The one to be injured or benefited may be the actor or some other. One and the same act may be done with an intent to injure one and benefit another.

§ 82. Intent may be divided into *general* and *particular*. Particular intent, or the intent with which any certain act may be done, is to be distinguished from the general intent. One may have a general intent to injure or benefit another, and synchronously with that intent may do some act concerning that other without any reference to the general intent, or without any particular intent, or with a particular intent different from or contradictory to the general intent. As a question of probability, the particular intent will follow the general, but not necessarily so; whether it does or does not is in every case a question of evidence.

§ 83. Intent or intention is a mental conception—an existence. It is a fact,[1] impalpable, intangible, invisible,

Austin's Lect. Juris. 94.) "It is perfectly manifest that badness or goodness cannot be affirmed of the will, and that a criminal intention may accord with a good disposition." (*Id.* 133.)

[1] The existence of mind is as much a matter of fact as the existence of matter. (Elementary Sketches of Moral Philosophy, by Sidney Smith, Introductory Lecture.) Intention is a fact. (Clift *v.* White, 12 N. Y. 538.)

but nevertheless a fact. The existence or non-existence of an intent or an intention, and the kind or character of the intent or intention are always questions of fact. Save the declarations of the individual in whose mind the intent is supposed to exist, we can have no *direct* testimony as to the existence or non-existence of any intent, or of the kind or character of the intent. Save such declarations, we can have none but *indirect* testimony. That indirect testimony is, the inference we may draw from one's acts.[1]

§ 84. Not technically, but in reality, when the intent is to injure, it is a *bad intent*, and bad intent is *malice*.[2]

A witness may be asked with what *intent* he did an act. (Seymour *v.* Wilson, 14 N. Y. 567; Griffin *v.* Marquardt, 21 N. Y. 121; Forbes *v.* Waller, 25 N. Y. 439.) But his evidence is not conclusive. (Griffin *v.* Marquardt, 21 N. Y. 121; Thurston *v.* Cornell, 38 N. Y. 287; Foster *v.* Cronkhite, 35 N. Y. 147.) And it seems this question is not permissible in certain cases, as where the intent may be or must be inferred from the act. (The People *v.* Saxton, 22 N.Y. 309; Shaw *v.* Stine, 8 Bosw. 161; Ballard *v.* Lockwood, 1 Daly, 164.) We are not aware of the right to put the question as to intent having been mooted in an action for slander or libel. We suppose it could not properly be put in any action for slander or libel, because we are of opinion the question of mere intent can never be material in those actions. But assuming that intent is or may be material, then the question might be put in connection with a state of facts which discloses a qualified legal excuse. In our opinion the decisions show the rule to be: you may inquire into the intent directly, as by inquiring of the party, in cases where the intent is material, and the act complained of is as consistent with a good intent as with a bad intent, but in no other cases. (See *supra*, and Booth *v.* Sweezy, 8 N. Y. 281; Ellis *v.* The People, 21 How. Pr. R. 356; Powis *v.* Smith, 5 B. & A. 850; see note to § 402, *post;* an article, 14 Albany Law Jour. 385, entitled, "The admission of direct testimony to the witnesses' intent.") "Because," says Mr. Erskine (Inst. iv, 4, 80), "the intention of the defender cannot always be known with certainty, in the trial of this crime [verbal injury], doctors are generally of opinion that his oath in supplement may, in doubtful cases, be admitted towards his exculpation." (Borthwick on Libel, 172, note.)

[1] The state of a man's mind can only be known by others through his acts, through his own declarations, or through other conduct of his own. (2 Austin's Lect. Juris. 106; Fisk *v.* Chester, 8 Gray, 508.) Previous intentions are judged by subsequent acts. (Dumont *v.* Smith, 4 Denio, 319, 320.) The intention of an act done must be judged by its necessary consequences. Where these are directly pernicious, the intent to work mischief becomes a conclusion of law. (Safford *v.* Wyckoff, 1 Hill, 11, referring to Reg. *v.* Boardman, 2 Moo. & Rob. 147, 148.) Where the guilt or innocence of the act depends upon the motive of the actor, his conduct and declarations as to other similar transactions about the same time are always admissible to show it. (Barren *v.* Mason, 31 Vt. [2 Shaw], 189; Scanlan *v.* Cowley, 2 Hilton, 489; Center *v.* Spring, 2 Clarke [Iowa], 393.)

[2] "Hardly any word in the whole range of the criminal law has been

The act by means of which a bad intent is sought to be realized, is a *malicious act*, and the act is done *maliciously*.

§ 85. Upon reference to the text-books and reports to discover the meaning *in use* of the terms intent[1] and malice, we find:

§ 86. As respects the term *intent*, it is sometimes employed to signify done intentionally, and in that sense is equivalent to will, or to what we have designated voluntary; sometimes employed to signify an intent to produce the consequences, or some certain consequences, by means of the act done, and sometimes employed to signify *bad intent* or *bad motive*. When employed in the sense of *will* or *intentionally*, it is sometimes divided into express, tacit, presumed, and fictitious.[2]

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used in such various and conflicting senses, nor is there any which it is more important to understand correctly." (Stephen's Crim. Law, 81.) The etymological meanings of the words malice and malicious are simply wickedness and wicked (*Id.* 82), and it will be found in practice impossible to attach to these terms any other meaning. (*Id.*) "I apprehend that there is no ground for distinguishing between the legal and the popular sense of the word, and that it means in its legal sense exactly what it means in its popular sense, namely, a mischievous design or intent to do an injury to an individual or to the public." (Daly, F. J., Viele *v.* Gray, 10 Abb. Pr. R. 5; 18 How. Pr. R. 550.) The law presumes from the act an intent to bring about its consequences; "to denominate this intent malice or malice in law, when it may have arisen from a good motive, the defendant believing what he alleges to be true, is to employ the word malice in a sense neither justified by its etymology, its ordinary meaning, nor its previous legal signification." (*Id.*) The difference in the import of the word malice in legal and in common acceptation is commented on, 17 Howell's State Trials, 43, 63. And see Sir Thomas Moore's distinction between *malitia* and *malevolentia* (1 *Id.* 391), and remarks on the introduction of the words *falso et malitose* into indictments for libel. (1 *Id.* 30; 6 *Id.* 1113.)

The term "malice," it is said, was formerly used in the sense of "cunning," as in the following sentence: "It [the letter] seemed very sensible, and composed with great *malice*, and in no sort to be suspected of being the letter of a madman." (Calendar of State Papers, Domestic Series of the Reign of Charles the First, London Athenæum, August 7, 1869, p. 169.)

[1] "If we would know the nature of wrongs, we must try to determine the meaning of *intention* and negligence with precision, for both of them run in a continued vein through the doctrine of wrongs, and one of them, *intention*, meets us at every step in every department of jurisprudence." (2 Austin's Lect. Juris. 80.) Unless the import of those terms is determined at the outset, the subsequent speculations will be a tissue of uncertain talk. (3 *Id.* 353.)

[2] See Lindley's Studies of Jurisprudence, 168, § 187, and *Id.* App. civ. Malice "seldom has any mean-

§ 87. As respects the term *malice*, it is sometimes employed to signify the absence of legal excuse,[1] sometimes as meaning a bad or wicked motive or intent,[2] sometimes as meaning *scienter*[3] or knowingly, sometimes as meaning

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ing except a misleading one. It refers not to intention but to motive, and in almost all legal inquiries intention, as distinguished from motive, is the important matter. (Stephen's Dig. Crim. Law, 190, n. 6.)

[1] Malice, the doing any act without a just cause. (1 Chit. Gen'l Pr. 46.) Malice in its legal sense always excludes a just cause. (Jones *v.* Givin, Gilb. Cas. 185.) It is a technical expression, and means the absence of any excuse. (Penn. *v.* Lewis, Addison's R. 282.) It is implied in every [wrongful] act for which there is no legal justification, excuse, or extenuation. (Penn. *v.* Honeyman. Addison's R. 149.) A term of law denoting directly wickedness, and excluding just cause or excuse. (1 Russ. C. R. 483.) A wrongful act, done intentionally, without just cause or excuse. (Bromage *v.* Prosser, 4 B. & Cr. 247; Bell *v.* Fernald, 38 No. West. Rep. 912: King *v.* Patterson, 9 Atl. Rep. 705.) If malice be used as a descriptive term, it must be understood of malice in a technical and artificial sense, as merely signifying the absence of any legal justification or excuse. (1 Starkie on Libel, 3.) If malice be used as descriptive, . . . it must be understood in its legal and technical sense, as merely denoting that which is inferred from the doing of a wrongful act without lawful justification or excuse. (*Id.* 213.) Malice, the doing any act injurious to another without just cause. (Bouvier's Law Dict. tit. Malice; see York's Case, 9 Metc. 93; Darry *v.* The People, 10 N. Y. 139; Hilliard on Torts, ch. vii. § 106; Mitchell *v.* Jenkins, 5 B. & A. 590.) Malice is the deliberate disregard of the rights of others. (Abbott, Ch. J., 3 B. & Cr. 584.) Malice may be implied against the declared motive of the actor. (Williams *v.* Hutchinson, 3 N. Y. 318.)

[2] *Malice.* In criminal law and general practice, wickedness of purpose: a spiteful or malevolent design against another; a settled purpose to injure or destroy another. Any formed design of doing mischief. (1 Hale's P. C. Am. ed. 455, note; 2 Stra. 766.) Any evil design in general. (4 Bl. Com. 198.) A disposition or inclination to do a bad thing. (2 Rolle's R. 461.) General wickedness of heart; inhuman or reckless disregard of the lives or safety of others, as when one coolly discharges a gun, or throws any dangerous missile among a multitude of people, or strikes, even upon provocation, with a weapon that must produce death. (4 Bl. Com. 199, 200.) Deliberate disregard of the rights of others, as when one carries on the trade of melting tallow to the annoyance of the neighboring dwellings. (Abbott, Ch. J., 3 B. & Cr. 584; Burrill's Law Dict. tit Malice; and see p. 64, note 2, *ante*.) *Legal malice, i. e.* improper or sinister motives. (Crescent Live Stock Co. *v.* Butchers' Union, 120 U. S. 148.)

"In common parlance we associate the idea of malice with the passions of anger, hatred, and revenge; but malice, in contemplation of law, may exist without the presence of either of these passions." (The State *v.* Simmons, 4 West. Law Jour. N. S. 411.)

[3] "Maliciously is sometimes equivalent to *scienter*." (3 Austin's Lect. Juris. 327.) A "*conscious violation*" of law. (9 Cl. & Fin. 321; and see Sherwin *v.* Swindall, 12 M. & W. 787.) In the Code prepared by Messrs. Austin & Lewis for the Island of Malta, they employ the phrase "*culpable knowledge*" in lieu of "*implied malice*." See Appendix A to House of Lords' Report on Law of Defamation, A. D. 1843. Maliciously must be taken to imply an intention either actual or constructive. (Lush, J., Reg. *v.* Templeton, Law Rep. 2 C. C. Reserved, 123.)

intentionally or voluntarily,[1] and often without any definite or ascertainable meaning whatever.[2] The term malice is also divided into *malice in fact*,[3] and *express malice* and

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[1] If I am arraigned of felony and willfully stand mute, I am said to do it of *malice*, because it is a wrongful act and done *intentionally*. (Bailey, J., Bromage *v.* Prosser, 4 B. & Cr. 247.) Any unlawful act done willfully is malicious. (Commonwealth *v.* Snelling, 15 Pick. 337.) In this respect, malice resembles a promise. A promise may be express or implied, but the only difference between an express and implied promise is the mode of proof. (North. R. R. Co. *v.* Miller, 10 Barb. 260.) In an action of libel, malice consists in intentionally doing what is injurious to another, falsely or without justifiable cause, and the presumption is against the truth or justifiable cause of the publication, until the contrary is expressly proved by evidence from the defendant. (Hagan *v.* Hendry, 18 Md. 177.)

[2] In the English law, in certain cases we have employed the word *malice* to mean intention generally. As malice implies intention, it has been extended to cases in which there is no malice. As I shall show, it does not denote the motive. And it is manifest that the motive to a criminal action may be laudable—the intention of an act, suggested by a blamable motive, lawful. (2 Austin's Lect. Juris. 110.) It having been assumed inconsiderately that malice or criminal design is of the essence of *every* crime, the term is extended abusively to negligence, . . . it is often confounded with malice, as denoting malevolence, insomuch that malevolence (though the motive or inducement of the party is foreign to his guilt or innocence) *is supposed to be* essential to the crime. (3 *Id.* 327.) Malice has also been defined "as the plain indication of a heart regardless of social duty, and fatally bent on mischief" (U. S. *v.* Cornell, 2 Mason, 60); improper motives (Weckerly *v.* Geyer, 11 S. & R. 35); willfulness (Dexter *v.* Spear, 4 Mason, 115; Holt on Libel, 55); a design formed of doing mischief to another (Reg. *v.* Mawgridge, Kely. R. 127); any wicked or mischievous intention of the mind (Rex *v.* Harvey, 2 B. & Cr. 257.) *Malice*, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another. (11 S. & R. 39, 40.) Indeed, *in some cases it seems not to require any intention in order to make an act malicious.* When slander has been published, therefore, the proper question for the jury is not whether the *intention* of the publication was to injure the plaintiff, but whether the tendency of the matter published was so injurious. (10 B & Cr. 472; S. C. 21 Eng. C. Law Rep. 117; and see 3 B. & Cr. 584; S. C. 10 Eng. C. Law Rep. 179; Pennington *v.* Meeks, 46 Mo. 216; People *v.* Taylor, 36 Cal. 256; Reg. *v.* Wallace, 3 Irish Com. Law Rep. N. S. 38; Bouvier's Law Dict. *voce* Malice.)

[3] Malice "has been sometimes divided into legal malice or malice in law, and actual malice or malice in fact. These terms might seem to imply that the two kinds of malice are different in their nature. The true distinction, however, is not in the malice itself, but simply in the evidence by which it is established. In all ordinary cases, if the charge complained of is injurious, and no justifiable motive for making it is apparent, malice is inferred from the falsity of the charge. The law in such cases does not impute malice not existing in fact, but presumes a malicious motive for making a charge which is both false and injurious, when no other motive appears. When, however, the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff

implied malice.[1] Probably the phrase implied malice is identical with the phrase malice in law, and the phrase express malice with the phrase malice in fact; for among the definitions we find malice in law defined as "The malice which is inferred from the doing a wrongful act without lawful justification or excuse."[2] The distinction between malice in law and malice in fact has been supposed to consist in this, that the one is *inferred* and the other is *proved.* The supposed distinction is unreal and unsound, for, first, there is no distinction between what is inferred and what is proved—*what is or is supposed to be rightly inferred, is proved.* "We say of a fact, it is proved,

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other proof of its existence. It is actual malice in either case, the proof only is different." (Selden, J., Lewis *v.* Chapman, 16 N. Y. 372.) The jury may infer malice from want of probable cause, but they are not bound to make this inference. And if malice is deduced from want of probable cause, it is as much malice in fact, within the meaning of the law, as though shown or deduced from any other fact or facts. (Smith *v.* Howard, 28 Iowa, 51.) Strictly speaking there is no such thing as fraud in law; fraud or no fraud is and ever must be a fact; the evidence of it may be so strong as to be conclusive, but still it is evidence, and as such must be submitted to a jury. No court can draw it against the finding of a jury. (Spencer, Senator, Seward *v.* Jackson, 8 Cow. 430.)

[1] The distinction between express and implied malice is well illustrated in the argument of that distinguished lawyer, Nicholas Hill, in Darry *v.* The People, 10 N. Y. 123, as thus: The term, *express* malice, originally meant malice proved independently of the mere act from which death resulted, and *implied* malice the reverse. They therefore described only different modes of proving actual guilt, not different degrees of it; and they belonged to the law of evidence, not to a definition of homicide. They did not even indicate different degrees of evidence, both kinds when sufficient, being conclusive until overcome. And they were applicable to every case where proof of the actual intent was requisite to characterize an offense." He supports these views by a profuse citation of authorities. The opinions in this case should be perused by those who desire information on the subject of implied malice. And see Stanners *v.* Finlay, 8 Irish Com. Law Rep. 283. Malice in fact is "of two kinds, either *personal* malice against an individual, or that sort of general violation of the right consideration due to all mankind which may not be personally directed against any one." (Pollock, Ch. B., Sherwin *v.* Swindall, 12 M. & W. 783.) By malice I mean not a pleading expression, but actual malice, or what is termed malice in fact, *i. e.* a wrong feeling in the mind. (Brett, J., Clarke *v.* Molineux, 3 Q. B. D. 237.) "Malice in law is such as the law infers to exist, without just or lawful excuse; also, in malice of either kind, you cannot have shades or degrees." (Coleridge, C. J., Stevens *v.* Sampson, 49 L. J. C. L. [App.] 120.) Malice, in fact, is ill will, bad or evil motive, or such gross indifference to the rights of others as will amount to a willful or wanton act. (Holt *v.* Parsons, 23 Texas, 9; Behee *v.* Railway Co. 9 So. West. Rep. 449; Bradstreet Co. *v.* Gill, *Id.* 757.)

[2] 1 Starkie on Libel, 213.

when we believe its truth by reason of some other fact from which it is said to follow;"[1] and, secondly, malice in fact is as frequently established by inference as by direct proof. Some judges have avoided this objection by denying that *malice in law* is a question of fact, and styling it *a conclusion of law*, which conclusion is not required to be proved, and is not permitted to be denied.[2] If malice in law is a conclusion of law, then is malice in fact a conclusion of law; and if this be so, it is still true that they are not distinguishable the one from the other. Whether malice *in fact* is here employed in the sense of want of legal excuse or in the sense of bad intent is immaterial on this point. The non-existence of legal excuse in the one case, and the existence of bad intent in the other can be proved only by inference. No argument can make it more

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[1] Mill's Logic, b. 2, c. 1, § 1.

[2] "The malicious intent of the publication is not a question of fact, but a conclusion of law. It is the intent which the law implies, and which the plaintiff is, therefore, not required to prove, nor the defendant permitted to deny." (Duer, J., Fry *v.* Bennett, 1 Code Rep. N. S. 243; 5 Sandf. 54; Lick *v.* Owen, 47 Cal. 252.) The only case in which malice may be proved is where privilege is pleaded. (Root *v.* Lowndes, 6 Hill, 529; Washburn *v.* Cook, 3 Denio, 112; Howard *v.* Sexton, 4 N. Y. 157.) "Malice, so far as the law requires it to sustain the action, is implied from the publication of that which is untrue—the law presuming it to exist in such a case. Therefore, *express malice is not required to sustain the action.*" (Littlejohn *v.* Greeley, 13 Abb. Pr. R. 55; King *v.* Patterson [N. J.], 9 Atl. Rep. 705; Pledger *v.* The State [Ga.], 3 So. East. Rep. 320.) "It is said that malice is involved in the issue. . . . The answer to this suggestion is, that in the action of slander, except in case of privileged communications. *express malice* forms no part of the issue. *Legal malice* only is affirmed or denied, and this results from proof of the transaction . . . which the law pronounces wrongful, and therefore malicious. 2 Greenl. Ev. §§ 410, 421, 518." (Gardiner, J., Howard *v.* Sexton, 4 N. Y. 160.) "In an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for the defendant on the ground of a want of malice." (Mansfield, Ch. J., Hargrave *v.* De Breton, 4 Burr. 2425, repeated by Bayley, J., in Bromage *v.* Prosser, 4 B. & Cr. 247; 6 Dowl. & R. 296.) Such an instance is Wilson *v.* Stephenson, 2 Price, 282, where the jury found that the speaking of the words by the defendant was not maliciously, on which a verdict was recorded for the defendant, and the court refused to disturb it. And see Smith *v.* Ashley, 11 Met. 367. Others say malice must be proved. "The jury have no more right to find malice in the defendant, without sufficient evidence, than they have to find any other fact in the plaintiff's favor without proof." (Woodruff, J., Liddle *v.* Hodges, 2 Bosw. 544.) And see Dolloway *v.* Turrill, 26 Wend. 396; Cooke on Defamation, ch. iv.

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so universally conceded that all collections of legal maxims include this: "*Actus non facit reum, nisi mens sit rea;*" which is translated: "An act does not make guilty, unless the mind be guilty"—that is, unless the intention be criminal; others assert that intent is immaterial in civil actions, *except* in the civil actions for slander and libel;[1] others

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constitute an offense there must be a guilty mind." (Reg. *v.* Sleep, Leigh & Cave, 44 Cockburn, C. J.) "A man cannot be said to be guilty of a delict unless to some extent his mind goes with the act." (Buckmaster *v.* Reynolds, 13 C. B. N. S. 62, Erle, C. J.)

[1] See Burrill's Law Dict. tit. *Actus*, where he adds: "The intent and the act must both concur to constitute the crime. (Kenyon, Ch. J. 7 T. R. 514; Broom's Max. 144.) This maxim is exclusively applicable to criminal law, *and to civil proceedings* for slander and libel; in [*query*, other] civil actions, the intent is immaterial if the act done is injurious to another. (*Id.* 155, 161.) The maxim, "*Affectio tua nomen imponit operi tuo*" [your disposition or intention gives name or character to your work or act], embodies the same principle. (Bract. fol. 101 b.) See Broom's Maxims, tit. *Actus non facit*, &c., where he says: With respect to libel and slander the rule is . . . . where an occasion exists, if fairly acted upon, furnishes a legal protection to the party who makes the communication complained of, the *actual* intention of the party affords a boundary of legal liability. See also Burrill's Law Dict. tit. *Voluntas*, citing *Voluntas et propositum distinguunt maleficia*—Will and purpose characterize crimes. *Crimen non contrahitur, nisi voluntas nocendi intercedat*—Crime is not contracted unless the intention of doing harm be present. *Tolle voluntatem et erit omnis actus indifferens.* Take away *will* and every act becomes indifferent.

We cannot pass the quotation of a so-called law maxim without entering our protest against the reception of law *maxims* as legal *axioms.* We believe that not a single law maxim can be pointed out which is not obnoxious to objection. The old law maxims must be put aside or forgotten or remembered only as things of the past and dead, even as we have put aside and forgotten maxims in science, supplying their places with maxims drawn from a larger experience and more philosophical analysis. "Perhaps there is a period in every system of law previous to which the formation of maxims will be productive of bad effects, as leading to the establishment of principles which it is not permitted to controvert, but which more enlightened views would repudiate." (Fortesque de Laudibus, &c. ch. viii, note to editions by Amos. See Dodderidge's English Lawyer; Doctor and Student, Dialogue I, ch. viii, ix; Bacon's Preface to his Maxims.) The benefit which science has received from the use of maxims is of a questionable nature, and the adoption of these is of a questionable nature whenever the ideas are confused. (Locke on the Understanding, Bk. IV, ch. vii.) In Bonomi *v.* Backhouse (27 Law Jour. Q. B. N. S. 388), Erle, J., says: "The maxim, *sic utere tuo ut alienum non lædas*, is mere verbiage. A party may damage the property of another where the law permits, and he may not where the law prohibits; so that the maxim can never be applied until the law is ascertained, and when it is, the maxim is superfluous." And in Jenkins *v.* Wheeler (4 Robertson, 575) the court said that the maxim, "freight is the mother of wages," is not universally true.

that intent is immaterial in slander and libel, or immaterial except under certain circumstances;[1] and others, that the

[1] The secret intention of the publisher is immaterial. (Hankinson *v.* Bilby, 16 M. & W. 442.) "It is an error to suppose that *motive*, except where the words are privileged, is in any way essential to a cause of action." The motive of the defendant is wholly immaterial as respects the right of action. The motive may be a good or a bad one. (Daly, F. J., Viele *v.* Gray, 10 Abb. Pr. R. 6, 7; 18 How. Pr. R. 550.) In an action brought by A. against B. for slandering the title of the former to certain slaves by him exposed to public sale, a verdict was found for him; B. brought his bill praying for relief, and an injunction against the verdict, and it was held that as the loss in the sale of the slaves was caused by B., *even though he was believed to have designed no injury*, he was bound to make reparation, and his bill was dismissed. (Ross *v.* Pines. Wythe, 71.) There is no instance of a verdict for the defendant on the ground of want of malice. (Mansfield, Ch. J., Hargrave *v.* Le Breton, 4 Burr. 2425; repeated by Bayley, J., Bromage *v.* Prosser, 4 B. & Cr. 247. See *post*, note to § 121.) If I give a man slanderous words, whereby I damnify him in his name and credit, *it is not material whether I use them upon sudden choler* and provocation, *or of set malice*, but *in an action upon the case I shall render damages alike.* (Bacon's Maxims of the Law, Regula, VII.)

The *intent* with which an act is done is by no means the test of the liability of a party to an action of trespass. (Guille *v.* Swan, 19 Johns. 381; Percival *v.* Hickey, 18 *Id.* 257; Tremain *v.* Cohoes Co. 2 N. Y. 164; Buckman *v.* Cowell, 1 N. Y. 507; Safford *v.* Wyckok, 1 Hill, 11; note to § 91, *post.*) *Bona fide* will not protect a magistrate who does an illegal act. (Prickett *v.* Greatrex, 1 New Mag. Cas. 543; 7 Law Times, 139.) It is immaterial with what motive a man does a legal act (Humphrey *v.* Douglass, 11 Vt. 22); and so of an unlawful act. (Amick *v.* O'Hara, 6 Blackf. 258.) Intention held to be immaterial. (Bullock *v.* Babcock, 3 Wend. 391; Baker *v.* Bailey, 16 Barb. 60.) Intent immaterial if the words are a libel. (People *v.* Freer, 1 Caines, 485.) In a private action for libel the motives are out of the question. (Root *v.* King, 7 Cow. 633.) If the words are not actionable *per se* and have not occasioned any special damage, no amount of malice in the publisher will make them actionable. (Kelly *v.* Partington, 3 Nev. & M. 116; 5 B. & Adol. 645; and see 2 Nev. & M. 460; 4 B. & Adol. 700.) "Bad motives in doing an act which violates no legal right of another, cannot make that act a ground of action." (Pickard *v.* Collins, 23 Barb. 459; Phelps *v.* Nowlen, 72 N. Y. 39; Heywood *v.* Tilson, 29 Alb. L. J. 37; collecting many authorities, and see in note to § 91, *post.*) If the facts be justified, the motive, intention, and manner are immaterial. (2 Burr. 807.) "Many cases may be cited to show that the question is not, from what *motive* did an act proceed? but, was the act justified by any right of the doer? . . . The motive, except so far as it is evidence of the end in view, is, judicially speaking, unimportant. (Lindley's Introd. to Juris. App. xxx.)

Where an act in itself indifferent, if done with a particular intent becomes criminal, there the intent must be proved and found; but when the act is in itself unlawful (*i. e. prima facie* and unexplained), the proof of justification or excuse lies on the defendant, and in failure thereof the law implies a criminal intent; in the latter case the intention is immaterial, and therefore not a question of fact in issue, for the crime consists in publishing a libel; "*a criminal intention in the writer is no part of the definition of the crime of libel at the common law.*" (*Per* Lord Mansfield, in Woodfall's Case.) The words quoted are from the opinion of the twelve English judges, delivered in the House of Lords, upon questions put to them on the subject of libel. (Journals of

essential element of a slander or a libel is malice or a malicious intent, the mind must be in fault;[1] and some

the House of Lords, 1792, Appendix 27; and 22 Howell's State Trials, 300; The People *v.* Crosswell, 3 Johns. Cas. 364.) Except in the cases of privileged communications, express malice forms no part of the issue. (Howard *v.* Sexton, 4 N. Y. 157, and see p. 72, note 1, *ante*.) "In which case [privileged communication] express malice must be shown, while in other cases express malice forms no part of the issue. Thorn *v.* Moser, 1 Denio, 488; The State *v.* Burnham, 9 New Hamp. 34; Howard *v.* Sexton, 4 N. Y. 157." (W. F. Allen, J., Bush *v.* Prosser, 11 N. Y. 355; see *Id.* 358, and the next following note.)

[1] "To constitute that injury [slander] malice must be proved, not mere general ill-will, but malice, in the special case set forth in the pleadings, to be inferred from it and the attending circumstances." (Gardiner, J., Howard *v.* Sexton, 4 N. Y. 161; quoted and approved by Rosekrans, J., Fry *v.* Bennett, 28 N. Y. 328; and by W. F. Allen, J., Bush *v.* Prosser, 11 N. Y. 357.) "Malice is essential to every action for libel." (Selden. J., Lewis *v.* Chapman, 16 N. Y. 372.) "But it is malice in a special and technical sense, which exists in the absence of lawful excuse." (Trunkey, J., Neeb *v.* Hope, 2 Central Reporter, 72.) "In *all* cases malice is essential to the action. Not *imputed* malice merely, but actual malice, malice established by proof." (Selden, J., Bush *v.* Prosser, 11 N. Y. 358.) To maintain the action, there must be: (1) "malice in the defendant; (2) injury to the plaintiff; (3) that the words should be untrue." (Ellenborough, Ch. J., Maitland *v.* Goldney, 2 East, 426.) The malice of the publication, or the intent to defame the reputation of another, is the essence of the offense of libel. (Commonwealth *v.* Clapp, 4 Mass. 163; Commonwealth *v.* Snelling, 15 Pick. 337.) In order to render the publisher amenable to the law, the publication must be *maliciously* made, but malice will be presumed if the matter be libelous. (Bouvier's Law Dict. *voce* Publisher.) "The *criminality* of the charge in the indictment consisted in a *malicious* and seditious *intention*. There can be no crime without a wicked mind." (Kent, J., The People *v.* Crosswell, 3 Johns. Cas. 364); and "as a libel is a *defamatory* publication made with a *malicious intent*." (*Id.* 377.) The injury consists in "*falsely and maliciously*" charging another with, &c. (Kent's Com. part IV, sect. 24, p. 706, of vol I, 11th ed.; and *Id.* p. 617.) "The essential ground of action for defamation consists of the *malicious intention*, and when the mind is not in fault no prosecution can be maintained;" and the story recited from Fox's Martyrology, in Brook *v.* Montague, Cro. Jac. 91, is referred to. "The mind must be in fault and show a malicious intent to defame." (Kenyon, J., Rex *v.* Abingdon, 1 Esp. 226; Reg. *v.* Wallace, 3 Irish C. L. Rep. N. S. 38.) "The guilt of the accused must depend upon the circumstances as they appear to him." Parke, B., see State *v.* Brown, 16 Pac. Rep. 261.) "By the law of England, *malice* is an essential ingredient in every action on the case for slander." (Borthwick on Libel, 194; Quigley *v.* McKee, 19 The Reporter, 250 (Oregon.) And in a note (*Id.*) attributed to Starkie, it is said: Every definition of the subject-matter of an action for slander, to be found in the books of reports or elementary writers, includes malice as an essential ingredient. Malice is the gist of the action for slander. (McGee *v.* Ingalls, 4 Scam. 30; White *v.* Nicholls, 3 How. U. S. Rep. 266.) There must be a mischievous intention. (George on Libel, 162.) The guilt [gist] of an essential ground of action for defamation consists in the *malicious* intention, and when the mind is not in fault, no prosecution can be maintained. (2 Kent's Com. 26; W. F. Allen, J., Bush *v.* Prosser, 11 N. Y. 355.) In the trial of the Seven Bishops, Justices Holloway and Powell both say, to make a libel it must be malicious. "The *main* ques-

expressly, and some by implication, assert that this fault in the mind, this bad intent or malice must be, in fact or impliedly, in the mind of the defendant in the action. And the divisions of will and of malice heretofore referred to (§§ 86, 87) appear to have been designed to meet this requirement in those cases in which there is no pretense of any bad intent, or no possibility of any bad intent in the mind of the defendant in the action. There will be no necessity for any such division of will or malice, if the dis-

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tion is, *quo animo* the defendant published the article complained of. . . . The plaintiff is bound to show that the defendant was actuated by malice." (Ellenborough, Ch. J., Tabart *v.* Tipper, 1 Camp. 350, 351.) "The gist of an action of slander, for words in themselves actionable, is the *malice* which produced them; take away this, and the suit is not maintainable in any shape." (Russell, J., Cook *v.* Barkley, 1 Penn. N. J. Rep. 180, and p. 183, *per* Pennington, J.) "The *quo animo* with which the words were spoken was the point in issue, as malice constitutes the gist of the action." "It is said there need be no express malice, except in the case of privileged communications, that, in other words, implied or legal malice is all that is required. What is meant by *implied* malice? Does it mean malice which the law imputes without any proof of its existence? I apprehend not. It means this: that the fact that the defendant is shown to have published a false charge against another, which was calculated to injure him, *proves* that the defendant was actuated by malicious motives, unless the circumstances are such as to suggest some other and innocent motive. This is nothing more than the application of a familiar rule of evidence, viz., that every person is presumed to intend that which is the natural consequences of his actions. . . . But is malice any more the ground of the action in cases of privileged communication than in others? Clearly not. It is called, for the sake of convenience, express malice in the one case, and implied in the other; but the malice is the same, the difference is in the proof alone. We may, therefore, assume that in *all cases* malice is essential to the action; not *imputed* malice merely, but actual malice; malice established by proof." (Selden, J., Bush *v.* Prosser, 11 N. Y. 358.) In actions for slander, it is of the essence of the action that the words be spoken maliciously. (Jarvis *v.* Hatheway, 3 Johns. 180.) No doubt but malice, as well as falsehood, is essential to sustain an action of slander. (Thorn *v.* Blanchard, 5 Johns. 529.) This is so under the Virginia Statute. (Chaffin *v.* Lynch, 1 So. East Rep. 803.)

The case of Mercer *v.* Sparks (Owen, 51; Noy, 45) was cited in McPherson *v.* Daniels (10 B. & Cr. 266) as an authority for the proposition that in an action for slander, malice need not be alleged; but, *per* Parke, J., "that was after verdict, and malice must have been proved at the trial." Malice "may be said to be a necessary ingredient, in one form or another, of all crimes whatever." (Stephen's Crim. Law, 81.) As to necessity of proving malice in actions for slander and libel, see George on Libel, 149; Jones on Libel, 8, 9, 11, 14; Comyn's Dig. Action for Defamation, G; Smith *v.* Ashley, 11 Met. 486; McCorkle *v.* Binns, 5 Binney, 340; Coxhead *v.* Richards, 2 C. B. 608; Lillie *v.* Price, 5 Ad. & El. 645; Harwood *v.* Astley, 4 Bos. & Pul. 47; and Hastings *v.* Lusk, 22 Wend. 416; Steele *v.* Southwick, 9 Johns. 214; Root *v.* King, 4 Wend. 113; 7 Cow. 613; 1 Saund. 243, note 4.

tinction between the wrong and the liability be observed (§ 66). At the same time that courts hold malice, meaning bad intent, to be a necessary ingredient of slander and libel, they hold that it is not absolutely necessary to allege malice in a declaration,[1] and that the introduction of an allegation of malice in a declaration for libel is "rather to exclude the supposition that the publication had been made on some innocent occasion, than for any other purpose."[2] And except to aggravate the damages, courts will not allow, on a trial, any evidence of malice (bad intent) in addition to that which is said to be inferred, until evidence has been given which countervails or reverses the so-called presumption of malice, or malice in law;[3] nor will they allow this presumption, nor malice in fact, to be contradicted by any mere denial, or shown not to exist by proving an actual good intent. They permit but one way of evading this malice in law, and that is by showing the existence of a legal excuse for the act of publication. If the legal excuse shown be a *prima facie* one only, its effect is merely to remove the alleged presumption of malice, and raise an alleged presumption of absence of malice, and, as it is said, require the plaintiff to show malice in fact. This very intricate course of procedure arises from erroneously treating, in practice, as an *affirmative* part of the essential element of a wrong that which is more properly a *negative* part,

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[1] In a complaint for libel it is not necessary to aver malice. (Purdy *v.* Carpenter, 6 How. Pr. R. 366.) Maliciously need not be used, if words of an equivalent import are used. (White *v.* Nicholls, 3 How. U. S. Rep. 266; Opdyke *v.* Weed, 8 Abb. Pr. R. 223; Viele *v.* Gray, 10 *Id.* 6.) The omission is cured by verdict. (McPherson *v.* Daniels, 10 B. & Cr. 266; Taylor *v.* Kneeland, 1 Doug. 67.) Wrongfully and injuriously are not equivalent to maliciously. (De Medina *v.* Grove, 10 Jur. 426.) Willfully and maliciously have essentially, if not precisely, the same meaning. (Lounds *v.* Delaware, &c., R. R. Co. 3 Hun, 329; affi'd, Ct. App. Feb. 8, 1876; § 328, *post*.)

[2] Abbott, Ch. J., Duncan *v.* Thwaites, 3 B. & Cr. 585.

[3] In the adjustment of damages, malice [*bad intent*] may become an element. (Viele *v.* Gray, 10 Abb. Pr. R. 6; 18 How. Pr. R. 566; Root *v.* King, 7 Cow. 633; Fry *v.* Bennett, 28 N. Y. 327; s. c. 3 Bosw. 200; Taylor *v.* Church, 1 E. D. Smith, 279; and 8 N. Y. 452; Littlejohn *v.* Greeley, 13 Abb. Pr. R. 57; Bush *v.* Prosser, 11 N. Y. 359; and see *post*, Damages.)

not required to establish the fact of a wrong done, but required only when it is designed to show that what is a wrongful act, and *prima facie* a wrong, is not so in fact (§ 63). Let a wrongful act stand for a wrong, unless and until a legal excuse be shown, and we make intelligible and consistent what is now difficult to understand, and only to be reconciled by a series of fictions.[1]

§ 89. One meaning in which intent or intention is employed is will. When so employed, it corresponds to what we have described as voluntary. And if instead of saying *intent* is necessary to constitute a wrong, we say *will* is necessary to constitute a wrong, and then keep in view the distinction between will (voluntary) and intent, we at once remove very much of the difficulty which has been supposed to be inherent in the law relating to slander and libel. It is conceded, at least by some, that in civil actions other than those for slander and libel, intent, in the sense of intending the consequences of an act, is immaterial;[2] why should the civil actions for slander and libel be exceptions? Certainly the burden of proving them to be exceptions lies upon those who insist that they are not within the rules which govern in every other civil action for a tort.

§ 90. One meaning of malice is absence of legal excuse. This is the sense in which the term is most frequently employed, and it is, we conceive, the only sense in which it is properly employed.[3] Substitute "absence of legal excuse" for "malice" in many opinions in the reports which are difficult to be understood, and they will become easily

[1] Mr. Stephen, after referring to the manner in which the word "malicious" operates in shifting the burden of proof from the prosecutor to the prisoner, and stating that legal fictions are matters of regret, says: "It would be better to throw the law into a different shape, and to enact specifically that persons who do acts of which the natural consequence is to kill, &c., shall be punished, instead of introducing the question of intent at all. (Stephen's Crim. Law. 304.)

[2] *Ante*, p. 71, note 1.

[3] See p. 66, note 1, *ante*.

intelligible, and accord with the principles we venture to propound.

To illustrate, that what is called malice in fact really means nothing more nor less than absence of legal excuse; suppose A. has untruly said B. is a thief, under circumstances that A. believing B. to be a thief, would constitute a legal excuse. A familiar instance of this is the case of giving, as it is termed, the character of a former employee. In the case supposed, the material inquiry is: What was A.'s belief? To answer this inquiry, and only for the purpose of answering this inquiry, it may be material to ascertain what feeling or intention A. had towards B.; if the feeling or intention is found to be friendly, it is a link in the chain of evidence that A. spoke believing what he said. If the feeling or intention of A. towards B. was unfriendly, it is a link in the chain of evidence that A. spoke rather from that feeling or intent or for some purpose other than from his belief; and being spoken not in a belief of its truth, the speaking was out of the pale of legal excuse, and was wrongful, not merely or in anywise because of the intent, which may have been good or bad, but because the speaking was under circumstances which do not constitute a legal excuse; that is, under a belief that the words spoken were true. If in such a case A. was allowed to testify, and was to admit that he did not believe to be true what he said concerning B., but that he spoke without any intent to injure or with a good intent towards B. or any other, that testimony would not constitute any defense; admitting that he did not believe what he spoke would take away the legal excuse.

§ 91. The intent—meaning the intent to effect certain consequences—with which an act is done is material on the question of the amount of damages; the absence of a bad intent will mitigate the damages; the presence of a bad intent will aggravate them (§ 290, *post*). The intent

of the actor is sometimes material as a link in the chain of evidence to determine whether or not some certain act was or was not done under circumstances constituting a legal excuse, as where the legal excuse is dependent upon the question, What was the belief of the actor? (§ 241, *post.*) With these exceptions, we conceive that intent is never material, and that intent is never an essential element of a wrong. No amount of good intent will excuse an act otherwise wrongful, and no amount of bad intent will make wrongful that which is otherwise a permitted act.[1] If intent is not an essential element of a wrong, neither, in the sense of bad intent, is malice. If the term malice is to be retained in use as a technical term, it must be only in the sense of want of legal excuse.

§ 92. This view is not, we are pleased to say, any innovation or novel doctrine; it is but a return to the old paths from which the departure has been very wide. Holt, after referring to the objections urged against the law of libel, says:[2] "It is urged that the motive of many publications which the law decrees libels, may be innocent and even laudable; and that without the proof of malice, or what is equivalent to malice, the mere act of composing or publishing a libel ought not to be the subject of punishment. This objection only becomes specious from the misappre-

[1] Legal criminality is merely legal responsibility, and may exist where there is no moral criminality whatever. (Holt on Libel, 53.) "It would be morally right perhaps, and yet actionable." (Jervis, Ch. J., Rogers *v.* Macnamara, 14 C. B. 37; *ante*, p. 72, note 1, and note to § 40, *ante.*)

"An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." (14 Albany Law Journal, 61, article copied from Southern Law Review, citing numerous authorities. See, in addition, Creemer *v.* Benton, 4 Lansing, 290; Chenango Bridge *v.* Paige, 83 N. Y. 178; and see in note to § 88, *ante.*)

"If there be an infraction of the law, the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character." (Reg. *v.* Hicklin, Law Rep. 3 Q. B. 370.)

[2] Holt on Libel, conclusion of ch. iii, bk. 1, p. 55; and see comments on this, 2 Mence on Libel, 25.

hension of the term *malice*. Malice, in legal understanding, implies no more than willfulness.[1] The first inquiry of a civil judicature, if the fact do not speak for itself as a *malum in se*, is to find out whether it be willfully committed; *it searches not into the intention or motive any further or otherwise than as it is the mark of a voluntary act;* and having found it so, it concerns itself no more with a man's design or principle of acting, but punishes without scruple what manifestly to the offender himself was a breach of the command of the legislature. The law collects the intention from the act itself—the act being in itself unlawful [wrongful], an evil intent is inferred, and needs no proof by extrinsic evidence. That mischief which a man does he is supposed to mean, and he is not permitted to put in issue a meaning abstracted from the fact. 'The crime consists in publishing a libel; a criminal intention in the writer is no part of the definition of the crime of libel at common law.' 'He who scattereth firebrands, arrows, and death (which if not an accurate, is a very intelligent description of a libel) is *ea ratione* criminal.' It is not incumbent on the prosecution to prove his intent, and on his part he shall not be heard to say, 'Am I not in sport.' To determine, therefore, the guilt of a civil act, and to inflict punishment on the offender, there is no need of knowing his motives. Human laws require no justification in imposing penalties for an act prohibited by the magistrate, in its consequences injurious, and which has indubitable marks of being voluntarily committed." This exhibits and illustrates our view that the intent which law regards is that intent which enters into the question, Was the act voluntary? and this it determines by the knowledge of the actor. Did he know, or ought he to have known, that his act would produce an injury? If he had this knowledge, or might, but for his own misfeasance

[1] See Dexter *v.* Spear, 4 Mason, 115.

or omission, have had this knowledge, he is liable for his act and its consequences. And it is altogether immaterial whether we say he is liable for the act and its consequences, or say he is liable for the act because it was voluntary, and for the consequences because he must be presumed to have intended them. The latter mode of statement is the more usual, but we think less correct, and may have contributed to the confusion which pervades our subject.

CHAPTER VI.

PUBLICATION—PUBLISHER.

A publication is necessary—Meaning of the term publication—The language published must be understood—The publication may be orally or in writing—What amounts to an oral and what to a written publication—Publication of effigy—Requisites of an oral publication—Requisites of a written publication—Time of publication—Place of publication—Who is a publisher—Republication and repetition, distinction between—Joint publication—Liability for publication—Voluntary and involuntary publications—Liability of principal and agent—Newspaper Publisher—Bookseller.

§ 93. As heretofore observed[1] (§ 23), for language to

[1] To publish means not only a "giving out," but a "taking in." In English we have only one word to express the idea, in the German they have two words. They say of a book *herausgegeben* that it is "given out," but not that it is published until sales of it have been effected. The word "published" was formerly used as equivalent to exhibit; thus in an advertisement which appeared in "The Tatler," No. 113, Dec. 29, 1709, it announced that a picture will be *published*, meaning *exhibited*, at a certain place on a certain day.

"Publication [of a writing] is nothing more than doing the last act for the accomplishment of the mischief intended by it." (Rex *v.* Burdett, 4 B. & Ald. 126.)

"The sense in which the word published is used in law, is in uttering of the libel. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet the meaning is not so limited in law. The making it known to an individual only is indisputably, in law, a publishing." (*Id.*)

The mode of publication of writings in early times was by scattering them in the highways or fields. (See Darcy *v.* Markham, Hobart, 120.) The conclusion of "The Outlaw's Song of Trail-le-baston," temp. Edward II, is as follows:

Escrit estoit en parchemyn pur mout remember
E gitté en haut chemyn qe um le dust trover.

[It is written on parchment to be better remembered, and cast on the highway that people may find it.] See Political Songs of England from John to Edward II. Edited and translated by Thomas Wright, Camden Society, 1839. (Astor Library.) And see London Quarterly Review, April, 1857.

affect another than its author the language must be published; that is to say, it must be communicated to some other than its author. There must be a publication.[1]

This method of publication seems to have continued at least until the sixteenth century. John Fox mentions "A libel or book entitled the Supplication of Beggars, thrown and scattered at the procession at Westminster, on Candlemas day (2d February, 1526), before King Henry the Eighth, for him to read and peruse;" and again, Wolsey immediately went to his Majesty (Henry Eighth) complaining of divers seditious persons having scattered abroad books. A single sheet may be a book. The like mode of publication was adopted by Burdet, tried "for conspiring to kill the king and the prince by casting their nativities, foretelling the speedy death of both, and *scattering* letters containing the prophesy among the people." (9 Foss's Judges of England, and Croke Car. 121.)

The meaning and Etymology of the word *trail-le-baston* is discussed in 3 Foss's Judges of England, 30, and note to Political Songs of England, and claimed to be different from that given in the law dictionaries.

That the mode of publication of libels among the Romans was by scattering them on the highways, may be inferred from the provisions in the codes in reference to the finding and finders of libels. The 4th resolution in Halliwood's Case, in Coke's fifth report, commences: "If any one *find* a libel." (See 2 Starkie on Libel, 226.)

A new method of framing and dispersing libels was invented, says Hume, by the leaders of popular discontent: Petitions to Parliament were drawn up, stating particular grievances, presented and immediately printed. And Lord Campbell (6 Lives of the Chancellors, 149) speaks of "a dispersion of libels in Westminster Hall, by means of an explosion of gunpowder, while the judges were sitting there." Of this he gives a further account, same volume, p. 186.

A most cowardly and atrocious, yet ingenious method of defaming is mentioned by Hazlitt in his "Essay on Wills," and referred to in the London Quarterly Review for October, 1860, as thus: "A wealthy nobleman hit upon a still more culpable device for securing posthumous ignominy. He gave one lady of rank a legacy 'by way of compensation for injury he feared he had done her fair fame;' a large sum to the daughter of another, a married woman, 'from a strong conviction that he was the father;' and so on through half a dozen more items of the sort, each leveled at the reputation of some one from whom he had suffered a repulse; the whole being nullified (without being erased) by a codicil."

A court of probate, it seems, has power to order the omission from the registry of a will of any defamatory or offensive matter contained in such will. (*Re* Honeywood, Law Rep. 2 Pro. & Div. 251; *Re* Wartnaby, 1 Rob. Ecc. 423; Curtis *v* Curtis, 3 Add. 33; Marsh *v.* Marsh, 1 Sw. & Tr. 528.) In Texas, by statute, on conviction of one for publishing a libel, the court may order the destruction of the libel.

The publication may be made by the telegraph. (See Jeffras *v.* McKillop, 4 Sup. Ct. Rep. [T. & C.] 578.) A telegraph company is liable for the subsequent publication in a newspaper of a communication which passed over its line. (Dominion Tel. Co. *v.* Silver, 10 Ontario Supreme Ct. Rep. 238.)

Publication by mailing postal card (Williamson *v.* Freer, L. R. 9 C. P. 393); and by postal telegram (Robinson *v.* Jones, 4 Irish Law Rep. 391). See note to § 244, *post;* and see "Libel on Postal Cards," 7 Canada Law Jour. 340; 20 Alb. L. J. 203.

[1] Lyle *v.* Clason, 1 Caines, 581; Weir *v.* Hoss, 6 Ala. 880.

§ 94. Publication is an ambiguous term, employed to signify sometimes the matter published, sometimes an act of publishing only,[1] and sometimes such an act of publishing as may subject the publisher to legal liability. Ordinarily the context will disclose in which of these several senses the term is employed.

§ 95. Every communication of language by one to another is a publication. But to constitute an *actionable publication*, that is, such a publication as may confer a remedy by civil action, it is essential that there be a publication to a *third person*, that is, to some person other than the author or publisher and he whom or whose affairs the language concerns (§ 107). No possible form of words can confer a right of action for slander or libel, unless there has been a publication to some third person.[2] The

[1] A fault very common in the English language; the Greek distinguishes between κτίσι and κτισμα, an act and a thing.

[2] 2 Starkie on Libel, 13, 14, citing 1 W. Saund. 132, note 2; Phillips *v.* Jansen, 2 Esp. Cas. 226; Hick's Case, Hob. 215; Rex *v.* Wegener, 2 Stark. Cas. 245; Force *v.* Warren, 15 C. B. N. S. 806; Edwards *v.* Wooton, 12 Coke R. 35; Ahern *v.* Maguire, Arm. Mac. & Og. 39. Where the defendant, knowing that letters addressed to the plaintiff were opened and read by his clerk, wrote and sent a letter directed to the plaintiff, which was opened and read by his, plaintiff's, clerk, this was held to be a publication. (Delacroix *v.* Thevenot, 2 Stark. Cas. 63.) Where a letter, folded but not sealed, was delivered to a third person to be conveyed to the plaintiff, and was so conveyed without being read by any one, held there was no publication. (Clutterbuck *v.* Chaffers, 1 Stark. Rep 471; Day *v.* Bream, 2 Moo. & Rob. 54.) A letter intended for W., and which to him would have been privileged, was by mistake addressed to and opened by another, held privileged. (Tompson *v.* Dashwood, 11 Q. B. D. 43.) Where a writing is sent to the plaintiff, and he, in the presence of a third person, repeats the contents of such writing to the writer, who admits having sent such a writing, this is not a publication of the writing to the third party. (Fonville *v.* McNease, 1 Dudley [So. Car.], 303.) So where a letter containing libellous matter was sent to the prosecutor, and he not being able to read, got his wife to read it for him, he afterwards, in presence of defendant and others, mentioned receiving the letter and its contents, and defendant admitted writing the letter, held, there being no evidence that defendant knew the prosecutor could not read, there was no publication. (State *v.* Syphrett, 2 So. East. Rep. 624.)

The delivery of a writing by the governor of a colony to his attorney-general, not for an official purpose, is an actionable publication. (Wyatt *v.* Gore, Holt, 299.) So is the delivery of a writing to any third person. (Ward *v.* Smith, 6 Bing. 749.) Giving a writing to a witness to copy, the copy being immediately sent to a foreign country and the original retained in the defendant's possession, is a publication upon which the cause of action arises *here*. (Kiene *v.* Ruff, 1 Clarke [Iowa], 482.)

husband of the author or publisher, or the husband or wife of him whom or whose affairs the language concerns, is regarded as a third person.[1]

§ 96. There cannot properly be said to be a communication of language by one to another, unless that other understands the signification or meaning of the language sought to be communicated.[2] When we say the language must be understood by the one to whom it is published, we mean only that the matter published must be in a language which the person to whom it is published can interpret to some meaning. To one who does not understand the language in which a publication is made, it is as to him nothing more than unmeaning sounds or signs, and not language (§ 1).[3]

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[1] A sealed letter, addressed and delivered to the wife, containing a libel on her husband, is a publication. (Schenck *v.* Schenck, 1 Spencer, 208; Wenman *v.* Ash, 13 Com. B. 836; and see Mills *v.* Monday, Lev. 112; Rolland *v.* Batchelder, 5 So. East. Rep. 695.)

Gibbons wrote defamatory matter of Trumbull, and had fifty copies printed in pamphlet form in Massachusetts. Forty-five copies he retained, and five copies he sent to his wife in New Jersey, indorsing four of them with the names of certain persons, acquaintances of the wife, but without any instructions to the wife as to how she should dispose of the copies so sent her. The wife delivered two of the copies in New Jersey to the persons whose names were indorsed thereon, and the others she delivered in New Jersey to Trumbull, who exhibited them to various persons. On Trumbull suing Gibbons in New York for libel, it was contended for defendant, (1) that there was no publication by defendant; (2) or no publication within the State. The second point was overruled, and as to the first it was held that *the delivery of the manuscript to be printed* was a publication, although a delivery to a wife in confidence would not be a publication, yet in the case then before the court the wife acted as the agent of her husband, and her delivery of the pamphlets amounted to a publication by the defendant. (Trumbull *v.* Gibbons, 3 City Hall Recorder, 97.)

"The uttering of a libel by a husband to his wife is no publication." (Wennhak *v.* Morgan, 20 Q. B. D. 635.) Such utterance was held to be a publication in a case where husband and wife were living apart. (Sesler *v.* Montgomery, 19 Pac. Rep. 686. See 38 Alb. L. J. 24.)

[2] Kiene *v.* Ruff, 1 Clarke (Iowa), 482; Miellenz *v.* Quasdorf, 22 The Reporter, 268.

[3] "Scandalous words, if they be spoken in an unknown tongue which none of the auditors understand, will not bear an action, because they do no injury." (D'Anvers' Abr. 146, pl. 1, 2.) "Where slander is published in a foreign language, it is necessary to show that the hearers understood the language." (2 Starkie on Slander, 52; Fleetwood *v.* Curley, Hob. 267; Viner's Abr. tit. Actions for Words, A, *b;* 2 Stark. Ev. 844; Holt on Libel, 245; for the slander and damage consist in the apprehension of the hearers. (Cro. Eliz. 496, pl. 16.)

§ 97. The publication of language may, in reference to the place at which the publication is made, be either in the vernacular or in a foreign language. Where the language published is the vernacular of the place of publication, it requires no proof that those who heard or read it understood it; but it may be shown that those who heard or read such language did not in fact understand its signification. Where the language published is one foreign to the place of publication, it will not be assumed that those who heard or read understood it, but it may be shown that such hearers or readers did in fact understand what they heard or read.[1] Where the matter published is in a language which he who hears or reads it understands, it will be assumed he understood it in the sense which properly belongs to it. In all cases of doubt, the question whether or not the third person to whom the publication was made understood the language employed, is a question of fact. How such third person understood the language, that is to say, the sense in which he understood it, is ordinarily a question of interpretation. In our courts, ordinarily a witness cannot be asked how he understood the language, or what he understood by the language.[2] (§ 384.)

§ 98. The publication of language may be orally or in writing. The distinction between these two modes of

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[1] Amann *v.* Damm, 8 Com. B. N. S. 597. But in Ohio, it is held that where words are spoken in German in a German county, it will be presumed that they were understood, and no averment that they were understood is necessary. (Bechtell *v.* Shatler, Wright [Ohio], 107. See Steketee *v.* Kimm, 48 Mich. 322. And as to Welsh words, see what is said in 1 W. Saund. 242, note 1. See § 530, *post*.

[2] Smart *v.* Blanchard, 42 N. H. 137; Wright *v.* Paige, 36 Barb. 438; Gibson *v.* Williams, 4 Wend. 320; Van Vechten *v.* Hopkins, 5 Johns. 211; Cresinger *v.* Reed, 25 Mich. 250. A witness who has heard a conversation cannot be asked: "What did you understand by that?" without previously laying a foundation for such a question by showing that something had previously occurred in consequence of which the words would convey a meaning different from their ordinary meaning; having done so, the witness may then be asked: "What did you understand," &c. (Daines *v.* Hartley, 3 Ex. 200; 11 Law Times, 271; see 2 Starkie on Libel, 52; Fleetwood *v.* Curley, Hob. 267. See *post*, Construction, § 140, and Evidence, § 384.)

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[1] Throwing a sealed letter, addressed
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nclosure of another, who delivers

letter intrusted to him to carry, his reading it would be a publication to him, and it would be no defense to say the sender did not intend that the messenger should read the letter.[1]

§ 102. The characters inscribed upon a paper may be communicated by one to another without any parting with the possession of the writing, the material written upon, itself; as by an exposure of the writing, the material written upon, in such a manner as that the characters inscribed upon it may be seen and read by another.

§ 103. The subject-matter of a writing, the signification of the characters inscribed upon a paper, may be communicated orally by one to another; and if this be done without any parting with the possession of the writing itself, and without any exposure of such writing to any other person—as where one reads the contents of a writing to another without parting with the writing itself, and without permitting the other to read the contents of such writing—this we *suppose* would amount only to an oral publication.[2]

§ 104. Parting with the possession of a writing, the material written upon, in such a condition and under such circumstances as that the characters inscribed upon it may

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it unopened to the plaintiff himself, is not a publication. (Fonville *v.* M'Nease, 1 Dudley [So. Car.], 303, and see Burnstein *v.* Davis, 7 L. N. 378 [Quebec].)

Sending to the person whom the writing concerns, a closed (sealed) letter is no publication; and a letter is always to be understood as being so closed, unless otherwise expressed. (Lyle *v.* Clason, 1 Caines, 581; Phillips *v.* Jansen, 2 Esp. 625; see 1 W. Saund. 132. note 2; Spaits *v.* Poundstone, 87 Ind. 522.)

Nor would it amount to a publication, though the plaintiff afterward repeated the contents of it publicly, and the defendant avowed himself the author of it. (Fonville *v.* M'Nease, 1 Dudley [So. Car.], 303.)

[1] Fox *v.* Broderick, 14 Irish Law Rep. 453; Rolland *v.* Batchelder, 5 So. East. Rep. 695. Baron Pollock held that defendant having the letter copied by his clerk before mailing, was a publication. See note to § 349, *post*.

[2] The writer's reading to a stranger his letter to the plaintiff, before dispatching it, is a publication. (Snyder *v.* Andrews, 6 Barb. 43; McCoombs *v.* Tuttle, 5 Blackf. 431; Van Cleef *v.* Lawrence, 2 City Hall Recorder, 41.) Query, the kind of publication.

be and are seen and read and understood by another, is a publication in writing. It amounts to a publication if or provided the subject-matter be read and understood.[1]

§ 105. An exposure by one person to another of a writing, the material written upon, without parting with the possession of such writing, but permitting the writing, the characters inscribed, to be read by the other, is a publication in writing.

§ 106. Effigy resembles a writing, the material written upon, as distinguished from the subject-matter of a writing. An exposure of an effigy or a parting with the possession of it in such a condition that it may be seen by another is a publication.[2]

§ 107. The requisites of *an oral publication* are: (1) that the language be spoken to or in the presence of at least some one third person (§ 95). No possible form of

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[1] Rolland *v.* Batchelder, 5 So. East. Rep. 695. Posting a writing in a public place, and taking it down before any one had read it, would not be a publication. 2 Starkie on Libel, 16, note *n*. See § 124, *post*, and note.

A publication by delivery of letters containing the defamatory matter, or by posting the writing on a church door, is termed *constructive publication* in Baldwin *v.* Elphinstone, 2 W. Black. Rep. 1037, referring to Rastell's Entries, tit. Action sur le case, 13. Mailing held a publication. (Rex *v.* Burdett, 3 Barn. & A. 717.)

By section 17 of statute 38 Geo. III, ch. lxxviii, the printer or publisher of every newspaper, or other such paper, was required to deliver a copy of the paper at the stamp office, and it was held that such delivery was a publication. (Rex *v.* Amphlit, 4 B. & Cr. 35.)

If A. sends a manuscript to the printer of a periodical publication, and does not restrain the printing and publishing of it, and he prints and publishes it in that publication, A. is the publisher, and liable to an action. (Burdett *v.* Cobbett, 5 Dowl. 301; see Bond *v.* Douglass, 7 Car. & P. 626.)

Printing, ... unless qualified by circumstances, is *prima facie* a publishing; the manuscript must be delivered to the compositors. (Baldwin *v.* Elphinstone, 2 W. Black. Rep. 1037; Holt on Libel, 293; Trumbull *v.* Gibbons, 3 City Hall Recorder, 97.) Plaintiff was in employ of defendant, a corporation, and was discharged. Defendant had a discharged list on which was placed the name of plaintiff with the cause of his discharge and copies of this list was sent to the Heads of Departments in plaintiff's business. held a publication. (Bacon *v.* Mich. Cent. R. R. 55 Mich. 224.)

[2] The civil law makes a distinction not only between oral and written defamation but between a publication *by writing* and *by pictures*. (Heineccius, lib. 47, tit. 10.)

words can be the basis of an action for slander if at the time of their utterance the only persons present are the speaker and the person to whom or whose affairs the language concerns.[1] (2) The third person present must *hear* the language spoken.[2] Whether the third person present at the speaking did or did not hear the language spoken is, in every case, a question of fact. And this is not the less the rule because where the speaking is in the presence of a third person, under such circumstances that he might have heard what was spoken, he may, as a rule of evidence, be assumed to have heard it, until it be shown that he did not hear.[3] The burden is on him who alleges a publication to establish that the third person heard the language spoken. (3) The third person must understand the language (§ 96). When hereafter we speak of an oral publication, or a publication orally, we shall intend a publication with the requisites above mentioned.

§ 108. The requisites of *a publication in writing* are (1) that the writing, the material written upon, be so exposed as that the subject-matter of the writing is *read* by at least some one third person (§ 101). No possible form of language in writing can be the basis of an action for libel if read only by the writer and the person whom or whose affairs the language concerns.[4] (2) The subject-

[1] Uttering slanderous words in the presence of the person slandered only is not actionable. (Sheffill *v.* Van Deusen, 13 Gray, 304; Broderick *v.* James, 3 Albany Law J. 232; Haile *v.* Fuller, 5 Sup. Ct. Rep. [T. & C.] 716; s. c. 2 Hun, 519; Desmond *v.* Brown, 33 Iowa, 13; Heller *v.* Howard, 11 Bradw. [Ill.] 554; and see note to § 95, *ante*.)

[2] "If none heard the words it is no slander." (Viner's Abr. tit. Actions for Words, L, *b*, 4; and see cases cited, 1 Caines R. 582.)

[3] The word "publish," as applied to speech, implies that the language was spoken in the presence and hearing of others. (Watts *v.* Greenlee, 2 Dev. 115; Viner's Abr. tit. Actions for Words, L, *b*, 4; *contra*, Desmond *v.* Brown, 33 Iowa, 13. See Goodrich *v.* Warner, 21 Conn. 432; 1 Hilliard on Torts, 319, note.) In slander it is sufficient if the words are said to have been spoken "in the presence" of others (Brown *v.* Brashier, 2 Penn. [Penrose & Watts], 114), or in the presence and hearing of divers persons, or of certain persons named. (Burbank *v.* Horn, 39 Maine, 233; and see 1 W. Saund. 242, n. 1; see § 324, *post*.)

[4] But delivery to the party libeled is a sufficient publication to support

matter of the writing must be *understood* by at least some one third person by whom it is read (§ 96). When hereafter we speak of a publication in writing, we shall intend a publication with the requisites above mentioned.

§ 109. The publication must be *prior* to the commencement of the action, and a publication prior to the commencement of the action should be proved.[1] Where a witness called to prove publication was unable to say whether the speaking the words referred to was before or after the date when the action was commenced, it was decided that his testimony was not admissible.[2] But it was held not to be a ground for arresting the judgment that it appeared on the face of the record that the writ issued prior to the alleged publication.[3]

§ 110. The place of publication may be within or without the territorial limits of the State or country within which redress is sought. The decisions, so far as they go, all hold, that as a question of jurisdiction, it is immaterial whether the publication was within or without the territorial limits of the State or country within which redress is sought, and this on the ground that the wrong follows the person, and may be redressed by civil action in any court having jurisdiction of the person at the time redress is sought. It is conceded, however, that as regards *crimes* no redress can be had in one State for a crime enacted within the territorial limits of another State, because a crime is a violation of the law of the State within which it

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an indictment. (Philips *v.* Jansen, 2 Esp. 624.) The moment a man delivers a libel from his hand and ceases to have control over it, there is an end of his *locus penitentiæ*, the *injuria* is complete. (Holroyd, J., Rex *v.* Burdett, 4 B. & Ald. 143.)

[1] Taylor *v.* Sturgingger. 2 Rep. Con. Ct. 367; Phila &c. R. R. *v.* Quigley, 21 How. U. S. Rep. 202; Lipprant *v.* Lipprant, 52 Ind. 273; see note to § 396, *post*. Where the complaint alleged that the words were spoken in the year 1871, it was held equivalent to an allegation of a publication prior to the commencement of the action. (Sonneborn *v.* Bernstein, 49 Ala. 168; see § 327, *post*.)

[2] Steward *v.* Layton, 3 Dowl. Pr. Cas. 430.

[3] Scovel *v.* Kingsley, 7 Conn. 284.

is enacted. This concession seems to imply that for a wrong committed in one State there can be no remedy in another; because the right to remedy is based on a violation of some general prohibition of the law, and not like a remedy on contract for a breach of a private convention between the parties, which of course follows the persons of the parties to the convention.[1] The effect of the place of

[1] Mr. Stephens, in his "Treatise on Criminal Law," insists that a crime and a tort differ only as regards their consequences.

No court "administers justice in general" (De Bode *v.* Reg. 13 Ad. & El. N. S. 386), and "the laws of a State have no force *proprio vigore* beyond its territorial limits." (Hoyt *v.* Thompson, 5 N. Y. 340.) "If two persons fight in France, and both happening casually to be here [in England], one should bring an action of assault against the other, it might be doubtful whether such an action could be maintained here [in England]. · · · It might perhaps be triable only where both parties at the time were subjects." (Mostyn *v.* Fabrigas, 20 State Tr. 82; 1 Smith's Leading Cases.) In Molony *v.* Dows (8 Abb. Pr. R. 316) it was held at *nisi prius*, but after elaborate argument and deliberation, that an action for an assault in California could not be maintained in the courts of the State of New York. In McIvor *v.* McCabe (16 Abb. Pr. R. 319), it was held that the courts of New York had jurisdiction of an action for a personal injury committed in New Jersey by one citizen of that State upon another. As to action for tort committed in a foreign country, see Scott *v.* Seymour, 6 Law Times Rep. N. S. 607; 1 Hurl. & Colt. 219; 32 Law Jour. Ex. 61; DeWitt *v.* Buchanan, 54 Barb. 31. "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must have been fulfilled. *First*, the wrong must be of such a character that it would have been actionable if committed in England. · · · *Secondly*, the act must not have been justifiable by the law of the place where it was done. (Phillips *v.* Eyre, Law Rep. 6 Q. B. 29; and see S. C. Law Rep. 4 Q. B. 225, The M. Moxam, Law. Rep. 1 Prob. & Div. 107; Barry *v.* Fisher, 39 How. Pr. R. 521; Newman *v.* Goddard, 5 Sup. Ct. Rep. [T. & C.] 299; S. C. 10 Sup. Ct. Rep. [3 Hun], 70; 48 How. Pr. R. 363; Klumph *v.* Dunn, 66 Penn. St. 141; Carter *v.* Goad, 6 So. West. Rep. 719 [Ark.]; Hastings *v.* Stetson, 126 Mass. 329; Robinett *v.* McDonald, 65 Cal. 612; Austin *v.* Bacon, 19 N. Y. St Rep. 662; § 159, *post*.)

"Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction, but of such matters as are merely transitory and follow the person, we acquire a jurisdiction by the help of that fiction to which I have already alluded [the fiction of laying the venue], and we cannot proceed without it." (Eyre, Ch. J., Ilderton *v.* Ilderton, 2 H. Bl. 145, 162.) As to torts committed at sea. (Percival *v.* Hickey, 18 Johns. 257; Novion *v* Hallett, 16 *Id.* 327; Wilson *v.* McKenzie, 7 Hill, 95)

Courts *may* refuse to entertain jurisdiction of torts committed out of the State. (Burdock *v.* Freeman, 27 N. Y. Week. Dig. 313; 46 Hun, 138; 10 N. Y. St. Rep. 756.)

To maintain an indictment for libel, the publication must be proved to have been made in the county laid in the indictment, all matters of crime being local. (Holt on Libel, 299, citing Rex *v.* Johnson, 7 East, 65.) In Trumbull *v.* Gibbons, 3 City Hall Recorder, 97, the libel was printed in Boston and published in New Jersey, but it was held the courts of New

publication upon the construction of the language published, and as a question of *venue*, and as affecting the liability, will hereafter be considered.

§ 111. The *person who makes a publication* is a publisher. In the text-books, and in reference to slander and libel, the term publisher is employed sometimes to signify the person who actually makes a publication, and sometimes the person who, not being the actual publisher, is liable for the publication—*is liable as publisher.* We shall always employ the term publisher in the sense of and to signify the person who actually makes the publication.

§ 112. *Republication* is a second or subsequent publication of the *same language. Repetition* is a publication of language of *the same import* or meaning, as the lan-

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York had jurisdiction; and see Glen *v.* Hodges, 9 Johns. 76; Smith *v.* Bull, 17 Wend. 323; Johnson *v.* Dalton, 1 Cowen, 548; Gardner *v.* Thomas, 14 Johns. 134.

If a citizen of New York goes into Canada and slanders his neighbor, an action will lie in the State of New York. (Lister *v.* Wright, 2 Hill, 320; Hall *v.* Vreeland, 42 Barb. 543; 18 Abb. Pr. R. 182; Bree *v.* Marescaux, 7 Q. B. D. 434.)

An action for slander will lie, in Indiana, for words, actionable at common law, spoken in another State. (Offut *v.* Earlywine, 4 Blackf. 460; Linville *v.* Earlywine, 4 Blackf. 469; Stout *v.* Wood, 1 *Id.* 71.) And the same in Vermont. (Langdon *v.* Young, 33 Vt. [4 Shaw], 136.)

It will be presumed until the contrary appears, that the words were spoken in the State in which the action is brought. (Worth *v.* Butler, 7 Blackf. 251.)

It is sometimes necessary to show a publication in a particular county. Where the defendant wrote letters in Ireland, and sent them to Middlesex county, England, to be printed and published, and the letters were there published, it was held to be a publication by the defendant in Middlesex county. (Rex *v.* Johnson, 7 East, 65; and to the like effect, Rex *v.* Middleton, Str. 77; Kiene *v.* Ruff, 1 Clarke [Iowa], 482.) Where A. wrote a letter and sent it by mail to B., in the county of B., and it was again sent to the county of M., at which county B. received and read it, held to be a publication in the county of M. (Rex *v.* Watson, 1 Camp. 215; and see Rex *v.* Girdwood, East's P. C. 116, 1120; Case of the Seven Bishops, 4 State Trials, 304; Rex *v.* Burdett, 4 B. & Ald. 95; 2 Starkie on Slander, 39–43; Commonwealth *v.* Blanding, 3 Pick. 304.) A newspaper printed in Montreal and mailed in Quebec, is published in Quebec. (Irvine *v.* Duvernay, 4 Queb. L. R. 85.)

In an action for suspending a lamp before the plaintiff's house, intimating that it was a house of ill-fame, held that the parish in which the declaration states the house to have stood and the tort to have been committed, was to be considered as venue merely, and not as local description, and it was immaterial whether there was any such parish in existence. (Jeffries *v.* Duncombe, 2 Camp. 3; 11 East, 226. And see Mersey Navigation Company *v.* Douglas, 2 East, 497.)

guage of a previous publication.[1] Repetition is a *subsequent publication* independent and distinct from the first publication. There may be a republication of a writing, *i. e.* a publication of the material written upon, with the writing thereon, and there may be a repetition of the subject-matter of a writing, also there may be a repetition of oral language (speech), but there cannot be a republication of oral language.

§ 113. Speech is but sound, a mere vibration of the atmosphere, cognizable only by the auditory sense. From its nature it necessarily follows that the *same* sound cannot be repeated; a *similar* or a *like* sound may be produced, undistinguishable in every respect from the first, and of the like character and signification, but that will not be the same sound. One who repeats a word previously spoken does not utter the identical word, but a similar or like word: he repeats *a like* sound of *the same signification* as the first. The two sounds are separate and distinct, although each has the same meaning. Hence each publication of oral language is a new, distinct, and separate publication.

§ 114. As respects oral publications, the person who actually makes the publication, the publisher, and the person liable as the publisher, must be always one and the same person. Every speaker is the publisher of what he speaks, and is solely liable therefor. That the words spoken have been previously published by another, can neither relieve the subsequent speaker from his liability for the publication made by him, nor impose any liability on the previous publisher. The act of publication is, as to each publisher, an entirely distinct act. Each person can

[1] Every publication of the same matter is a distinct injury for which action lies. (Woods *v.* Pangburn, 75 N. Y. 495; rev'g S. C. 14 Hun, 540.) Where defendant, after judgment against him for one publication, makes a republication, he is liable therefor. (*Id.*)

be liable only for the publication made by him.[1] If one makes an oral publication, and another repeats it, without authority from the first speaker, the first publisher is not liable for the repetition.[2] Besides that, the repetition is not a repetition of the same language (§ 113), the repetition is neither a necessary nor a natural and proximate consequence of the first publication. It is not an exception, but a corollary of this rule, that where the repetition is privileged, the author of the defamation is liable for the consequences of such privileged repetition. The repetition is a natural consequence of the first publication. Thus, where the defendant made a defamatory communication to A. respecting the plaintiff, in the employment of his, A.'s wife, which A. repeated to his wife, who in consequence dismissed the plaintiff from her service, held that the defendant was liable for the damages occasioned by the dismissal.[3]

§ 115. As respects a publication by writing, a libel, not only the publisher but all who in anywise aid or are concerned in the production of the writing are liable as publishers; the publication of the writing is the act of all concerned in the production of the writing (§ 113). Thus, if one composes and dictates, a second writes, and

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[1] See a case where several partners slandered a fellow-partner. (Gilbert *v.* Chrystal Fountain Lodge, 4 So. East. Rep. 995 [Ga.].)

[2] Where A. uttered a slander of B. the wife of C., and B. repeated the slander to C., in consequence of which C. refused to cohabit with B., held that no action could be maintained against A.; the publication was not A.'s, and A. was not responsible for the consequences of it. (Parkins *v.* Scott, 6 L. T. N. S. 394; S. C. Perkins *v.* Scott, 1 Hurl. & Colt. 153; § 202, *post*; and see Tunnicliffe *v.* Moss, 3 C. & K. 83; Bree *v.* Marescaux, 7 Q. B. D. 434-7; Dicken *v.* Shephard, 22 Md 399.) Query. If the first publisher requests a repetition. (Keenholts *v.* Beeker, 3 Denio, 346, and § 67 *ante*.) But the person who originates the slander can be liable only for the special damage occasioned by his own communication of it. (Cates *v.* Kellogg, 9 Ind. 506; Dixon *v.* Smith, 5 Hurl. & Nor. 450; Fowler *v.* Bowen, 30 N. Y. 20; Ward *v.* Weeks, 7 Bing. 211: Cochran *v.* Butterfield, 18 New Hamp. 115.) But see Bassell *v.* Elmore, 48 N. Y. 561.

[3] Derry *v.* Handley, 16 Law Times, N. S. 263; and, see *post*, § 202.

a third publishes, all are liable as publishers, and each is liable as a publisher.[1]

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[1] All concerned in making a libel are alike liable. "The law denominates them all makers." (Holt on Libel, 288, 289; 2 Starkie on Slander, 225; Bishop's Crim. Law, § 931 [814], citing Rex *v.* Drake, Holt, 425; Rex *v.* Paine, 5 Mod. 163; Rex *v.* Bear, Carth. 407; Rex *v.* Williams, 2 Camp. 646.) "All persons who concur and show their assent or approbation to do an unlawful act, are guilty; so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; and if several are assenting and encouraging a man in that act, though the stroke was given by one, yet all are guilty of homicide." (Quoted by Kent, Ch. J., in Dale *v.* Lyon, 10 Johns. 461; Cochran *v.* Butterfield, 18 New Hamp. 115.) See § 383, *post*.

Where a newspaper is owned by a corporation, one who is merely an officer thereof cannot be held responsible individually for a libellous publication made without his knowledge or direction, but if he was engaged in the general management [of the business or newspaper] he would be liable. (Penn. Sup. Ct., Feb. 1, 1886, Nevin *v.* Spieckemann. Opinion per Curiam, 30 Alb. L. J. 56.)

The publisher is equally responsible with the author of a libel. (Dexter *v.* Spear, 4 Mason, 115.) Printer and editor are both liable. (Watts *v.* Fraser, 7 Car. & P. 369; Rex *v.* Dover, 16 Charles II, 2 St. Tr. 547, Hargreaves' ed.) The proprietor of a newspaper is liable for defamatory matter, published in the form of an advertisement in his paper, although others are also liable for the same publication (Harrison *v.* Pierce, 1 Fos. & Fin. 567); and the author of a libel may be sued for its publication, notwithstanding that the publisher of the libel has been sued in respect of it. (Frescoe *v.* May, 2 Fos. & Fin. 123.) The responsibility of the writer of a private letter for the publication of its contents, is not limited to the consequences of a communication of them to the person to whom the letter is addressed, but extends to the probable consequences of thus putting the letter in circulation. (Miller *v.* Butler, 6 Cush 71; see Bassell *v.* Elmore, 48 N. Y. 561.)

Where, in case for oral and written slander, to support the count on the latter, a reporter to a newspaper was called, who proved that he had written down from the defendant's mouth (who said at the time it would make a good case for the newspapers) the statement which he afterwards sent to the editor, and that a paragraph, which afterwards appeared, was in substance the same, held, that what was so published in consequence of what passed with the defendant, might be considered as published by the defendant; but to prove that what was published was the same as that given to the editor by the reporter, could only be done by producing the written paper itself. (Adams *v.* Kelly, 1 Ry. & M. 158) See Clay *v.* The State, 86 Ill. 147; Clifford *v.* Cochrane, 10 Bradwell (Ill.), 577.

Two persons having participated in the composition of a libelous letter written by one of them, which was afterwards put into the post-office, and sent by mail to the person to whom it was addressed: such participation was held to be competent and sufficient evidence to prove a publication by both. (Miller *v.* Butler, 6 Cush. 71; and see Reg. *v.* Cooper, 15 Law Jour. Rep. Q. B. 206; 8 Q. B. 533; Parkes *v.* Prescott, Law Rep. 4 Ex. 168.) One who writes an article in English, and employs another person as his agent to translate it into German and publish it, will be liable if the German article so published is libelous, although the translation is inaccurate. (Wilson *v.* Noonan, 27 Wis. 598.) In Kentucky, instigators of slander may be sued jointly with the utterer of the slander. (Pauley *v.* Drain, 6 So. West. Rep. 329.) (The slanderer was about 12 years old.)

§ 116. The mere composing or writing any certain form of words, and keeping the writing and its contents confined to the custody and to the knowledge of the composer or writer, so that it is not communicated to any other person, does not render the composer or writer liable either to indictment or to civil action, for there is no publication. So, having or retaining possession of a writing, no matter by whom written, cannot amount to a wrong by the person so having or retaining possession of such writing; for as to him, at least, there is no publication.[1] The composer and the writer of matter which is afterwards published is liable as publisher for such publication.[2] And this liability, *as we suppose*, is not to be qualified by the circumstances under which the publication occurred. It would be no excuse to say that the writing was kept guarded and concealed, and was taken from him by force, or obtained from him by fraud or by the procurement of the party by whom or whose affairs it concerns.[3] If the matter written is of an injurious tendency, and any injury ensues from its publication, the composer and the writer are liable, not because of any imputed or presumed malice in making the publication, but because, unless such a writing had been created, the injury occasioned by it could

[1] Until publication, possession of a libel is no more than the possession of a man's thoughts. (Rex *v.* Almon, 5 Burr. 2689.) So long as the writer retains possession of the writing, he has a *locus pœnitentiæ;* but "The moment a man delivers a libel from his hands, and ceases to have control over it, there is an end to his *locus pœnitentiæ;* the *injuria* is complete, and the libeler [the writer] may be called upon to answer for his act." (Rex *v.* Burdett, 4 B. & Ald. 143, Holroyd, J.: and see 5 Mod. 167; Holt on Libel, 294; 2 Starkie on Slander, 228; Rex *v.* Rosenstein, 2 Car. & P. 414.)

[2] Holt on Libel, 289; Bond *v.* Douglass, 7 C. & P. 626; Miller *v.* Butler, 6 Cush. 71; Burdett *v.* Cobbett, 5 Dowl. 301; Giles *v.* The State, 6 Ga. 276.

[3] Where the plaintiff sent his agent to the office of the defendant, the publisher of a newspaper, to purchase a copy of the paper, held that a sale to such agent was a publication to a third person. (Brunswick *v.* Harmer, 14 Q. B. 185; see King *v.* Waring, 5 Esp. Cas. 13; Thorn *v.* Moser, 1 Denio, 488; Griffiths *v.* Lewis, 7 Ad. & El. N. S. 61; *contra*, see Sutton *v.* Smith, 13 Miss. 120; Smith *v.* Wood, 3 Camp. 323; Allen *v.* Crofoot, 2 Wend. 515; Gordon *v.* Spencer, 2 Blackf. 286; Hays *v.* Leland, 29 Maine [16 Shep.], 233; and see in notes to §§ 121, 123, *post.*)

not have happened; creating the writing and preserving it were wrongful acts, for the necessary or natural and proximate consequences of which the authors are liable, on the general principle that a wrong-doer cannot excuse his act, by reason of the act whether rightful or wrongful of others.[1]

§ 117. The material written upon, and the subject-matter inscribed upon such material, are substantial entities. The very identical writing may be passed from hand to hand, and each such passage is as well a separate and distinct publication as a republication of such writing. Every person concerned in making such a publication is liable not alone for the consequences of that publication, but for the consequences of any subsequent publication of the *same writing*. One and the same writing may be many times published at the same or at several and distinct places, and may have many publishers; and many persons may be liable as publishers at one and the same time, or at several times. The subject-matter of a writing cannot be *republished* apart and separate from a republication of the writing, the material written upon. Apart from the material on which the matter is inscribed, it is as impossible to republish the same subject-matter of a writing as it is to republish the same sound of oral language or speech. If one copies the subject-matter of a writing upon another piece of material, the copy is no more the SAME subject-matter as the subject-matter copied from, than is the repetition of a sound an uttering of the same sound. The copy is not the same writing, but another—a second and independent writing, having *the like* but not *the same* subject-matter. A publication of this copy would have no other connection with the original than that it contained *the like* subject-matter. The per-

[1] Collins *v.* Middle Level Comm'rs, Law Rep. 4 C. P. 279; affirming the principle in Scott *v.* Shepherd, 2 W. Bl. 892.

sons liable for the publication of the first writing would not be liable for the publication of the second or the copy, and the persons responsible for the publication of the second writing would not be responsible for the publication of the original writing. The publication of the second writing is neither a necessary nor a natural and proximate consequence of the publication of the first writing, nor is a publication of the first writing a necessary or a natural and proximate consequence of the publication of the second writing. It may be urged that but for the publication of the first writing the second might not, or perhaps could not, have come into existence. The author of the second writing could not have possessed the material or knowledge requisite for its production. The same objection would apply, and with equal force, to an oral publication. If the first speaker had not uttered the words, the second speaker could not have repeated them. We know such an objection would be unavailing. Again, it may be urged that the one who dictates the language forming the subject-matter of a writing, which is afterwards published by another, is responsible for such publication, either solely or jointly with the publisher, or that the writing first published is equivalent to a dictation of the language of the second writing; but this is not so; the dictation, to incur any responsibility for a subsequent publication of the language dictated, must, we submit, be made with *an intent or a request* that the language so dictated shall be subsequently published (§§ 114, 1155, 118, 202, 210).

§ 118. There may be a joint publication by writing, but, for the reasons heretofore stated (§ 113), there cannot be a joint oral publication. If two or more utter the *like* words, either simultaneously or separately, it is not a joint publication, but a several publication by each, for which each must be sued separately, and for which they

cannot be sued jointly.[1] Within this rule husband and wife are considered as separate individuals. If husband and wife utter the like words, either simultaneously or separately, there are two publications—a separate publication by each (§ 304). For the words uttered by the husband he must be sued alone; for the words uttered by the wife, the husband and wife must be sued together.[2] Two or more may agree together (conspire) in composing a set of words which one or both shall speak; that is to say, two or more may conspire to injure another by an oral publication of language; for this the remedy would be, not an action for slander, but an action for a conspiracy to defame.[3]

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[1] A joint action cannot be maintained against two or more persons for slander. (Webb *v.* Cecil, 9 B. Mon. 198; Forsyth *v.* Edminston, 2 Abb. Pr. R. 431; 5 Duer, 653; Chamberlaine *v.* Willmore, Palm. 313; 1 Bulst. 15; 2 W. Saund. 117a; The State *v.* Roulstone, 3 Sneed, 107; 2 Bish. Crim. Pro. § 766; Patten *v.* Gurney, 17 Mass. 182; Heard on Libel, 222, note 1; Chamberlain *v.* White, Cro. Jac. 647; Burratt *v.* Collins, 10 Moore, 451; Carrier *v.* Garrant, 23 Up. Can. C. P. R. 276; Donaghue *v.* Gaffy, 53 Conn. 43; 54 Conn. 257; Gilbert *v.* Crystal Fountain Lodge, 4 So. East. Rep. 905 (Ga.); Shurtleff *v.* Stevens, 51 Vt. 501; 37 Alb. L. J. 227.) "It is an established rule, both here and in England, that two persons cannot join as pursuers in an action of calumny; but if defamatory language is published of partners in trade, whereby they are injured in their trade, a joint action will lie at the suit of the partners; and, upon an extension of the same principle, it has been determined that a body corporate or an association of individuals may be injured by scandal, and may accordingly prosecute for redress of it. Society of Solicitors *v.* Robertson, November 16, 1781, Mor. 13, 935; Shearlock *v.* Beardsworth, December 20, 1816, 2 Mur. Rep. 19." (Borthwick on Libel, 174.) It is impossible for three men to make arbitrament by word of mouth, because it cannot be jointly pronounced. (Lawson's Case, Clayt. 17, A. D. 1663; and see Billings *v.* Russell, 8 Boston Law Rep. N. S. 699; Hinkle *v.* Davenport, 38 Iowa, 35.)

[2] Tait *v.* Culbertson, 57 Barb. 9. There must be separate actions for words spoken by a husband and a wife. (Penters *v.* England, 1 McCord, 14; Malone *v.* Stillwell, 15 Abb. Pr. R. 425; Swithen *v.* Vincent, 2 Wils. 227.) Husband and wife may be jointly sued for a libel published by them jointly. (Catterall *v.* Kenyon, 3 Q. B. 310; Keyworth *v.* Hill, 3 B. & Ald. 685.) In New York the husband is still (Feb., 1889) liable for the tort of his wife. (Fitzgerald *v.* Quann, 109 N. Y. 441; Genenz *v.* De Forest, 17 N. Y. St. Rep. 523; Mangan *v.* Peck, 19 *Id.* 78.) And so in Pennsylvania. (Quick *v.* Miller, 17 The Reporter, 379, Apr. 1883.) Husband and wife cannot sue jointly for slander. (Parsons on Contracts, vol. i, pt. 1, ch. i, p. 20, 3d ed; see Parties, §§ 301, 304. *post.*

[3] See 2 Hilliard on Torts, 444, 558, n.; Hood *v.* Palm, 8 Barr (Pa. St.) 237; Haldeman *v.* Martin, 10 *Id.* 369; Stiles *v.* White, 52 Mass. (11 Met.) 356.

§ 119. Where the publication is the joint act of two or more, they may be sued jointly or separately; if sued separately, the plaintiff can have but one satisfaction, but may elect *de melioribus damnis*. Thus, where A. brought an action for libel against B., who pleaded *puis darrein continuance*, that he was a partner with C. in the printing and publishing the newspaper which contained the libel, and that A. brought a previous action against C. for the same identical publication, and recovered a judgment which had been satisfied, &c. On demurrer this was held a good plea, and that the plaintiff could have but one satisfaction, but might elect *de melioribus damnis*.[1]

§ 120. A publication, the act of publishing, must be upon some occasion (§ 50), and must either be voluntary or involuntary (§ 67). Liability as publisher depends upon the occasion and upon whether, as to the person sought to be charged, the publication was voluntary or involuntary, and generally upon the principles to which reference has heretofore been made (§§ 50, 67, 68, 70). In the text-book and reports much is said on the subject of privileged publications, employing the term publication to mean as well the act of publishing as the matter published; and these privileged publications are divided into such as are *absolutely* privileged and such as are *conditionally* privileged. Reserving the subject of privileged publication to be hereafter considered at length, we limit ourselves here to stating that *all involuntary* (§ 124) and *some voluntary* publications are privileged.

§ 121. Where a closed paper is given to an employee to deliver to another, it becomes the duty of the employee to deliver such paper as directed, and without inspecting its contents. In making the delivery without ascertaining

[1] Thomas *v.* Rumsay, 6 Johns. 26; Brown *v.* Hirley, 5 Up. Can. Q. B. R. (O. S.) 734; Webb *v.* Cecil, 9 B. Mon. 198. See *post*, §§ 251, 305.

the contents of the paper, he but performs a duty; and, as the performance of a duty is an involuntary act (§ 39), and cannot amount to a wrong (§ 42), if it happen that the paper contained defamatory matter, the employee should incur no liability. The act of publishing *defamatory matter* was as to him *involuntary*. He did not know and was not under any obligation to know, the contents of the paper carried and delivered by him. He could have known the contents of the paper only by a violation of his duty; having simply performed his duty, no liability attached to him.[1] But if, in such a case, the employee

[1] It is not the duty of a carrier to know the contents of a package, and he is not liable for its contents. (See 36 Alb. L. J. 102.) In Nutt's case, as reported, Barnard. 306, it is said: If a servant carries a libel for his master, he certainly is liable for what he does, though he cannot so much as read or write. Mr. Starkie (2 Starkie on Slander, 29, note *f*), referring to this *dictum*, says: "It is impossible not to dissent from this doctrine, so expressed without the qualification added that the servant had some reason to know that he was discharging an illegal mission." That the defendant could not read, and therefore was ignorant of the contents of the paper published may be urged in mitigation. (Rex *v.* Holt, 5 T. R. 444.) To constitute a publication, such as will render the publisher liable to an action, the publication must be *knowingly*. (Layton *v.* Harris, 3 Harring. 406.) International. (Viele *v.* Gray, 10 Abb. Pr. R. 22; 18 How. Pr. R. 567.) One is not liable for a publication *inadvertently*. (Rex *v* Abingdon, 1 Esp. Cas. 228.) As by delivering by *mistake* a paper out of his study. (5 Mod. 167; Holt on Libel, 290.) Or if it be stolen from him. (See Weir *v.* Hoss, 6 Ala. 881; Barrow *v.* Lewellin, Hob. 62; 1 Hill, Torts. 321, note 7; § 116, *ante*.) Reading a libel in the presence of another without knowing it before to be a libel, with or without malice, does not amount to a publication. (4 Bac. Abr. 458; Holt on Libel, 290.) But if he who has either read a libel himself, or has heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it. (Hawk. P. C. ch. 73, § 10; Holt on Libel, 291.) Reading a libel by command of his father or master is not an actionable publication —so said in Comyn's Dig. tit. Libel, B, II, and cited George on Libel, 162.

If a man delivers *by mistake* a libelous paper out of his study, he would probably be held liable civilly, for the publication was by his carelessness. (Mayne *v.* Fletcher, 4 M. & Ry. 312; 2 Stark. Sland. 30, note *s*.)

"The mere act of communicating that which is slanderous will not subject a party even to civil liability without some degree of culpability on his part. If, for instance, a servant or agent were in the ordinary course of his duty to deliver a sealed libel, without any knowledge of its contents, though he were thus the actual instrument of publication, yet if he acted but as the agent of another, without any reason for suspecting that any wrong was intended, he would not subject himself to any civil, still less to any criminal responsibility." (1 Starkie on Libel, 226 [227].)

In an action against the defendant for publishing libels, it appearing that five packets, addressed to individuals and inclosed in one addressed to him, had been received at the coach-office

does in fact know the contents of the paper, he cannot excuse himself by saying he carried and delivered it as agent or employee (§ 67). Ordinarily it would be said that the non-liability of the employee, in the instance above put, arose from the absence of *malice* on his part in making the publication; but this can only mean that he had a legal excuse for performing the act, namely, that the act, so far as it was wrongful, was as to him involuntary. This is the true ground for the decisions in which the non-liability is said to be the absence of malice. Decisions that cannot be explained on this ground were either erroneously decided or decided upon erroneous grounds. The true ground for the decision in Smith *v.* Ashley,[1] was, the absence of "*conscious violation*" of law, and the absence of "*culpable knowledge.*"[2] The work of fiction published had nothing

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where he was porter, and he delivered them; held that if the jury found that he did so in the course of his business and in ignorance of the contents, he was not liable; but being *prima facie* liable, it was for him to show such ignorance. (Day *v.* Bream, 2 M. & Rob. 54.) Van Benthuysen *v.* Staub, 36 La. Ann. R. 467; 17 The Reporter, 588, was an action for libel against a news-dealer. A boy in the employ of defendant had sold a copy or copies of the paper containing the libel. Defendant did not show ignorance of the contents of the paper and he was held liable.

[1] An action for a libel cannot be maintained against the publisher of a newspaper for the publication of matter not on its face defamatory, if he has at the time of publication no knowledge that the matter is defamatory. Hence, if he publishes an article which he believes to be a fictitious narrative, or mere fancy sketch, and does not know that the article is applicable to any one, he cannot be held responsible, although it was intended by the writer to be libelous, and to apply to the party who brings the action. In such case, the writer only is answerable to the party libeled. (Smith *v.* Ashley, 11 Met. 367.) In Wilson *v.* Stephenson (2 Price, 282), the jury found the words charging plaintiff with being a murderer were spoken by defendant, but not maliciously, on which a verdict was rendered for the defendant. The court refused a new trial. (See Beehe *v.* Mo. Pac. R'way, 9 So. West. Rep. 449.) In Bromage *v.* Prosser, 1 C. & P. 475, Bayley, J., speaking of what he terms "an ordinary action for a libel," meaning, we suppose, an action in which the publication is not claimed to be privileged, says: "Nor is there any instance of a verdict for the defendant on the ground of a want of malice," and see per Mansfield, Ch. J., in Hargrave *v.* Le Breton, 4 Burr. 2425.

One partner in a furniture store is not liable for a libel published without his consent or connivance by another partner. (Woodling *v.* Knickerbocker, 31 Minn. 268. With partners in a publishing business it would be otherwise. (Lothrop *v.* Adams, 133 Mass. 471.) When the partners unite, actually or impliedly in the publication, all are liable. (Atlantic Glass Co. *v.* Paulk, 3 South. Rep. 800.)

[2] See note to § 87, *ante*. "He who shall be convicted in the said case

on its face to indicate that it reflected upon any individual or his affairs; the publisher did not know, and had no means of knowing, that it reflected on any individual or his affairs; in so far, therefore, as it did reflect upon any individual, it was as to the publisher an involuntary act, equally as much as the unconscious delivery by an employee of defamatory matter by the direction of his employer. This subject will be further discussed hereafter, when we come to treat of defenses.

§ 122. Upon the principles of law condensed in the expression *respondeat superior*, one is responsible not only for what he does or omits to do in his own proper person but also for all that his *agents*, within the scope of their authority actual or implied, may do or omit to do in and about his business.[1] Every one is charged with the duty to exercise such a vigilance in the selection of agents, animate and inanimate, as are competent and adequate to the performance of the business they may be required to transact, and the ends they may be designed to accomplished; he must exercise such a control over them that in the transaction of his business they neither do nor omit to do any act amounting to a wrong. He cannot escape this liability by omitting to exercise this vigilance; for such omission is itself negligence. It is upon this principle, and not upon any presumption of malice, that an employer or principal is held responsible for the act of his servant or agent.[2]

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either ought to be a contriver of the libel, or a procurer of the contriving of it, or a *malicious* publisher of it, *knowing it to be a libel.*" (9 Co. 59; Mo. 813; George on Libel, 107.)

[1] Mott *v.* Consumers Ice Co. 73 N. Y. 543; Buffalo Oil Co. *v.* Standard Oil Co. 3 N. Y. St. Rep. 450, 453. Absence of knowledge as an excuse see Carr *v.* James, L. R. 7 Q. B. D. 135; Reg. *v.* Holbrook, 39 Law Times Rep. 536.

[2] Haines *v.* Sepultz, 12 Cent. Rep. 806. Legal criminality is merely legal responsibility, and may exist where there is no moral criminality whatever. (Holt on Libel, 53.) Malice, in legal understanding, implies no more than *willfulness* (*Id.* 55; note 1, p. 67, *ante;* Rounds *v.* Delaware R. R. Co. 10 Sup. Ct. Rep. [3 Hun], 329): and between *negligence* and *willfulness* there is no difference but of degree. (Bramwell, B., Mangan *v.* Atterton,

§ 123. The proprietor of a newspaper is responsible for all that appears in its columns, although the publication

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Law. Rep. 1 Ex. 240.) Negligence embraces acts of commission as well as acts of omission, and diligence implies action as well as forbearance to act. (Grant *v.* Mosely, 29 Ala. 302.) But the only principle on which a man can be rendered liable for the wrongful acts of another, is that such a relation exists between them that the former, whether he be called principal or master, is bound to control the conduct of the latter, whether he be agent or servant. The maxim of the law is *respondeat superior*. (Blackwell *v.* Wiswall, 14 How. Pr. R. 258.) The managers of one branch of defendant's company wrote letters to another branch. These letters contained libelous matter concerning plaintiff, a former employee of the company, there being no evidence that the defendant, a corporation or its directors or managing board, had authorized such letters, held, action could not be maintained. (Freeborn *v.* Singer Sewing Machine Co. 2 Manitoba Law Rep. 253.)

The rule of liability [of a principal for the acts of his agents], is not based upon any presumed authority in the agent to do the acts, but upon the ground of public policy. (Lee *v.* Village of Sandy Hill, 40 N. Y. 448; Farmers' Bk. *v.* Butchers' Bk. 16 N. Y. 133.) The wrongful act is the servant's in fact and the principal's by construction. (Bruff *v.* Mali, 34 How. Pr. R. 344.) "A servant in a glass-house nowise employed in filling the pots, and not having anything to do with the management of them, threw in some broken glass to secret it from his master—held this rendered the master liable to the penalty for putting materials into a pot without notice to an excise officer. (Atty. Gen. *v.* Perrin, cited in appendix No. VI. to Evans' Pothier on Obligations.) It is said to be the law that a master is responsible for all wrongful acts of his servant, within the scope of his employment, and in executing the matter for which he was engaged at the time. (See Allen *v.* London & S. W. R'way, Law Rep. 6 Q. B. 67; Rounds *v.* Delaware R. R. Co. 10 Sup. Ct. Rep. [3 Hun], 329.) But not if done contrary to the orders of the employer. (Newman *v.* Jones, 17 Q. B. D. 132; Buffalo Oil Co. *v.* Standard Oil Co. 42 Hun, 153; 34 Alb. L. J. 66; citing Seine *v.* The State, 55 Md. 566; 39 Am. Rep. 419. 433, note 32; Graff *v.* Evans, 8 Q. B. D. 373.

In an action for a libel contained in a letter, proof that it was written by defendant's daughter, who was authorized to make out his bills and write his general letters of business, is not sufficient, unless it can be shown that such libel was written with the knowledge of or by the procurement of the defendant. (Harding *v.* Greening, 1 Moore, 477; 1 Holt N. P. 531; 8 Taunt. 42.) Writing the letter was not within the scope of the daughter's authority to act for her father. (*Id.*)

In 1874, Appleton & Co., book publishers, had a contract with Chambers, by which they gave him the exclusive sale of the American Cyclopædia. In 1877 they terminated the contract, but agreed to furnished him with volumes of the work to supply old subscribers; they afterwards contracted with one Holland substantially as with Chambers.

Disputes arose between Chambers and Holland. The Appletons attempted to keep the peace between them.

Meantime one, Swope, who had been employed by Chambers, but had entered the service of Holland, issued a circular regarding his former employer in libelous language. Shortly after one of these circulars came to the Appletons by mail. After reading it, they handed it to James C. Derby, the head of the Cyclopædia department of their business, denouncing it, and instructing him to have nothing to do with its circulation. He took it to his desk, showed it to one or two persons, and in a day or so it was missing. He thereupon, in his own name, and upon his own responsibility, wrote Swope for other copies which he obtained,

may have been made without his knowledge, in his absence, and contrary to its orders. His liability is not on the ground of his being the publisher, nor of being presumed to be the publisher, but because he is responsible for the acts of the actual publisher.[1]

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and there was evidence tending to show that he had given one of these away.

Upon this state of facts Chambers sued the Appletons for $20,000 damages, the case was tried before Judge Barrett and a jury. Judge Barrett charged the jury that the delivery of the circular to Derby by the defendants was not a publication, for, as between them, it was a privileged communication; that the defendants were not liable for Derby's independent unauthorized acts in showing it to other persons, nor for his negligence in finally losing it, although they would be liable if they were negligent in entrusting it to him, taking into consideration his age, experience and position.

The jury found a verdict for the defendants, and the General Term affirmed the judgment, April, 1883.

A parent is not liable as such for the wrongful act of his child. (Tifft *v.* Tifft, 4 Denio, 175; and see Moon *v.* Towers, 8 Com. B. N. S. 611; American Law Register for October, 1884.)

If an attorney introduces slanderous matter into the pleadings, without the direction of his client, the client is not responsible. (Hardin *v.* Cumstock, 2 A. K. Marsh. 480.) And so by statute in Louisiana. See *ante*, p. 54, note 1.

[1] The Penal Code of New York provides: § 246, "Every editor or proprietor of a book, newspaper or serial, and every manager of a partnership or incorporated association, by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper, or serial. But in every prosecution for libel the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication, and whose act was disavowed by him so soon as known." The proprietor of a newspaper is responsible for whatever appears in his columns. It is unnecessary to show that he knew of the publication, or authorized it (Huff *v.* Bennett, 4 Sandf. 120), for he is liable even though the publication was made in his absence and without his knowledge, by an agent to whom he had given express instructions to publish nothing exceptionable, personal, or abusive, which might be brought in by the author of the libel. (Dunn *v.* Hall, 1 Carter [Ind.], 345; and see Curtis *v.* Mussey, 6 Gray [Mass.], 261; Comm. *v.* Morgan, 107 Mass. 199.) See in note to § 349, *post*, and 12 Irish Law Times, 88; Libel published in newspaper without proprietor's knowledge.

An action for a libel lies against the proprietor of a gazette edited by another, though the publication was made without the knowledge of such proprietor. (Andres *v.* Wells, 7 Johns. 260; and see Buckley *v.* Knapp, 48 Mo. 152; McDonald *v.* Woodruff, 2 Dill. Cir. Ct. R. 244; Perrat *v.* Times Newspaper, 25 La. Ann. 170.)

But if a printing press and newspaper establishment be assigned to a person merely as security for a debt, and the press remains in the sole possession and management of the assignor, the ownership of the person holding the security or lien is not such as will render him liable to an action as proprietor. (Andres *v.* Wells, 7 Johns. 260.)

A receiver of a newspaper establishment, appointed to take charge thereof, and continue the publication of the newspaper, would be responsible for any defamatory matter published

§ 124. The liability of the proprietor of a newspaper is shared in common with the proprietor of a printing-press, a printer, book publisher and bookseller. The proprietor of a bookstore or newspaper store is responsible for the contents of every book and paper sold in his store,[1]

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in the newspaper while the same was under his control. (Martin *v.* Van Schaick, 4 Paige, 479.) Although a receiver having charge of the publication of a newspaper is responsible for what is published, his responsibility is not to be tested by an action. A receiver is an arm of the court, he is not to be sued. (Camp *v.* Barney, 6 Sup. Ct. Rep. [T. & C.] 622; Barton *v.* Barbour, 104 U. S. 126.) The proper mode of procedure is by petition to the court appointing the receiver. This was the course pursued in Stubbs *v.* Marsh, 15 Law Times, N. S. 312. In that case damages were awarded the petitioner, and it being found that the libel was published through the carelessness of the receivers, they were ordered personally to pay the costs of the petition. A receiver of a railroad was held liable as a common carrier. (See Blumenthal *v.* Brainerd, 38 Vt. 408; Paige *v.* Smith, 99 Mass. 395; Kerr on Receivers, 193, note; Camp *v.* Barney, 6 Sup. Ct. Rep. [T. & C.] 622.) A receiver was appointed to carry on the publication of a newspaper in Dayton *v.* Wilkes, 17 How. Pr. R. 510; Kelly *v.* Hutton, 17 Weekly Rep. 424, and in many unreported cases.

The editor and publisher of a newspaper is answerable in law, if its contents are libelous, unless the libelous matter was inserted by some one without his order and against his will. (The Commonwealth *v.* Kneeland, Thacher's Crim. Cas. 346.)

The liability of the proprietor for all that appears in his paper, proceeds from this: He puts the instrument for wrong doing in the hands of the wrong-doer. He may be compared to one who keeps a dangerous animal, and who is bound so to keep it that it does no harm; if harm ensues he must answer for it. (See Domat, § 1568, and note—One maliciously setting a bear loose.)

Rex *v.* Gutch, 1 Moo. & Mal. 433: on the trial of defendant for publishing a libel in a newspaper of which he was the proprietor, it was contended on his behalf that he was not liable, because he took no part in the publication of the newspaper; but he was held liable and the court said: "A person who derives profit from and who furnishes means for carrying on the concern, and intrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears:" and see Rex *v.* Alexander, 1 Moo. & Mal. 437; 3 Albany Law Jour. 46; and see Atty. Gen. *v.* Siddon, 1 Cr. & Jer. 220.

[1] "It is not material whether the person who disperses libels is acquainted with their contents or otherwise, for nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. (2 Starkie on Slander, 30, note *v*; Moore, 627; Wood's Inst. 431; Bac. Abr. tit. Libel, 458; 3 Greenl. Ev. § 171; Gibhardt *v.* England, 8 New Jersey Law Jour. 146; see note, p. 101, *ante*.)

Nutt's Case, Fitzg. 47; Barnard. 306: The defendant was tried for publishing a libel. It appeared in evidence the defendant kept a pamphlet shop, and that the libel was sold in defendant's shop, by her servant, for her account, in her absence, and that she did not know the contents of it, nor of its coming in or going out. This was held to be a publication by the defendant, but a juror was withdrawn. (See Barnes *v.* The State, 19 Conn. 407.)

unless he can show that he did not know, and had no reason to suppose that the book or newspaper contained any defamatory matter. In an action for libel against a news-vender, the defendant denied the publication, and pleaded that he was a news-vender carrying on a large business; that he sold copies of the newspaper containing the alleged libel in the ordinary course of his business, and without any knowledge of the contents. Upon the trial, the jury found: (1) that the defendant did not know that the newspapers at the time he sold them contained libels on the plaintiff; (2) that it was not by reason of any negligence on defendant's part that he did not know there was any libel in the newspapers; and (3) that defendant did not know that the newspaper was of such a character that it was likely to contain libellous matter, nor ought he to have known so. Upon the findings judgment was given for defendant. The plaintiff appealed. Lord Esher, in affirming the judgment, said: The finding comes to this, defendant was the *innocent disseminator* "of a thing containing a libel, which he had no reason to suppose contained one.

Rex *v.* Dodd, 2 Sess. Cas. 33: The defendant was tried for publishing a libel. It was insisted for the defendant that she was sick, and that the libel was taken into her house without her knowledge. This was held no excuse: the law presumed her acquainted with what her servant did.

In Rex *v.* Almon, 5 Burr. 2689, the liability of booksellers was much discussed, and the court expressed an opinion that the sale of a libel in a bookseller's shop was *prima facie* evidence of a publication, though not so conclusive but that it might be rebutted by circumstances. It is said (2 Starkie on Slander, 34), "But the defendant may rebut the presumption by evidence that the libel was sold contrary to his orders, or clandestinely; or that some deceit or surprise was practiced upon him; or that he was absent under circumstances which entirely negative any presumption of privity or connivance." And reference is made to Rex *v.* Almon, *supra*, and to Woodfall's Case, where the publication was by a servant of the defendant, the defendant being at the time within prison walls. In Rex *v.* Fisher, 1 Moo. & Mal. 433, it is said the presumption arising from proprietorship of a newspaper may be rebutted and an exemption established. If the publication is made without the consent of the writer, the offense is not complete as to him. (Weir *v.* Hoss, 6 Ala. 881. See Holt on Libel, 294.) As if the writing be stolen from him. (Mayne *v.* Fletcher, 9 B. & Cr. 382.)

In Chubb *v.* Flanaghan, 6 Car. & P. 431, it was held that if a publication consists in merely selling a few copies of a periodical in which the libel was contained among the articles, it was a question for the jury whether the defendant *knew* what he was selling.

The consequences of holding him liable in such a case would be too enormous. A mere carrier of a thing containing a libel would be liable—even a railway company that carried a paper containing a libel over the country, though the paper was one not at all likely to contain libellous matter. The consequences would be too great; and as this question depends upon common law, and not upon statute, it may be safely laid down that any proposition which alleges that the common law of England is wholly unreasonable and unjust must be an erroneous proposition."[1] In a case against the American News Company for publishing a libel by selling copies of the newspaper, a verdict for a large amount was obtained against the defendant, but the judgment was reversed upon the ground that although it was shown the defendant had distributed two hundred and forty copies of the libel, it was not shown that any one had read the libel.[2]

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[1] Emmens *v.* Pottle, 16 Q. B. D. 356; see 2 Leg. Adv. 211 (Liability for libel of vendor of newspaper), and 23 Alb. L. J. 401 (Suits against news companies as sellers of newspapers), and *ante*, n. 1, p. 106, and § 120.

[2] Prescott *v.* Tousey, 50 N. Y. Superior Ct. Rep. 12; see § 104, *ante*, and *contra*, see Giles *v.* The State, in note to § 373, *post*. The Penal Code of New York, provides: § 245. To sustain a charge of publishing a libel, it is not necessary that the matter complained of should have been seen by another, it is enough that the defendant knowingly displayed it, or parted with its immediate custody, under circumstances which exposed it to be seen or understood by another person than himself.

CHAPTER VII.

CONSTRUCTION OF LANGUAGE.

Actionable quality of language dependent upon its construction—All language ambiguous or unambiguous—Difficult to determine what is and what is not ambiguous—Points upon which ambiguity may arise—Causes of ambiguity—Ambiguity, how explained—Different effect of language concerning a person and of language concerning a thing—Materiality of questions, what person or thing affected, and whether the person is affected as an individual merely, or in some acquired capacity—Principles of construction; before verdict; after verdict—Examples of construction—Divisible matter.

§ 125. Language as a means for effecting a wrong must be either such as *is actionable* or such as *is not actionable.* To which of these divisions any particular language is to be referred may depend upon the construction of the language in question. Anterior, therefore, to an inquiry into what language is and what language is not actionable, it is proper here to consider at least the principal rules by which alleged defamatory language is construed. The question as to when the construction is with the court, and when by the jury, is discussed in a subsequent chapter (§§ 281–286).

§ 126. Language may be ambiguous or unambiguous.[1]

[1] "Words or signs may be divided into three classes: (1) those which bear an obvious and precise meaning on the face of them; as if A. say to B., you *murdered* C.; (2) those which on the face of them are of dubious import, and are capable either of a criminal or innocent meaning; as if A. says to B., you were *the death* of C.; (3) those which are *prima facie*

It is not easy in every case to determine what is ambiguous and what is unambiguous language. Language may be unambiguous on its face, which, by reason of some circumstances connected with it, is in fact ambiguous. This is always the case with language used ironically. When language is unambiguous on its face, it must be construed as unambiguous, unless its ambiguity be shown; and on the one who asserts the ambiguity of language unambiguous on its face, is the burden of establishing the ambiguity.[1]

§ 127. When language is ambiguous, the ambiguity may be either (1) whether the language concerns a person or a thing, or (2) what person or what thing it concerns, or (3) if it concerns a person does it concern him as an individual merely or in some acquired capacity, as in an office, trade or profession; (4) what is the import or signification of the language, and (5) is the charge or matter divisible or indivisible.

§ 128 The ambiguity may be patent or latent, that is

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and abstractedly innocent, and which derive their offensive quality from some collateral or extrinsic circumstances; as if A. says to B., you *did not murder* C., which words, from the ironical manner of speaking them, may convey to the hearers as unequivocal a charge of murder as the most direct imputation." (1 Starkie on Slander, 46.)

[1] "Where the words of themselves impute a larceny, and are unaccompanied by an explanation showing the hearers that they were not so intended, the defendant must show that they referred to a transaction that was not larceny, and were so understood by all who heard them. And where the plaintiff had taken wood through mistake, and defendant, knowing the excuse for taking it, persists in charging him with stealing, in reference to such taking, he cannot fall back and rest upon the plaintiff's innocence." (Phillips *v.* Barber, 7 Wend. 439; and see Maybee *v.* Fisk, 42 Barb. 336.)

"As doubtful or apparently innocent words may by circumstances be shown to be actionable, so may words apparently actionable be explained by circumstances to have been intended and understood in an innocent sense. Thus, though the defendant should say, Thou art a murtherer, the words would not be actionable if the defendant could make it appear that he was conversing with the plaintiff concerning unlawful hunting, when the plaintiff confessed that he killed several hares with certain engines, upon which the defendant said, Thou art a murtherer, meaning a murtherer of hares so killed. 4 Co. 13." (1 Starkie on Slander, 98; § 134, n.) Where the words are defamatory on their face, the burden is on the defendant to show they have not the meaning they plainly import. (Myers *v.* Dresden, 40 Iowa, 660; § 134, *post.*)

to say, the ambiguity may be inherent in the language and apparent upon its face, or the ambiguity may arise by reason of the language in question being connected with some other language or event in such a manner as that its accustomed signification is affected and changed by such other language or event.

§ 129. The ambiguity of language unambiguous upon its face is shown, and the ambiguity of language in every case is explained, by introducing the other language or event which exhibits or which explains the ambiguity, and by alleging the supposed true meaning of the language in question. The manner by which ambiguity is shown and explained is by allegations in pleading, termed averments, colloquia, and innuendoes, the nature and offices of which several allegations will be considered under the head of Pleading.[1]

§ 130. Whether the language concerns a person or a thing, *i. e.*, the affairs of a person (§§ 25, 27, 28), is material in this respect: that language, when it concerns a person and is discommendatory, is always, in the absence of any evidence to the contrary, regarded as *uncalled for*,

[1] An *averment* is to ascertain that to the court which is generally or doubtfully expressed, so that the court may not be perplexed of *whom*, or of *what* it [the language] ought to be understood, and to add matter to the plea to make doubtful things clear. A *colloquium* serves to show that the words were spoken in reference to the matter of the averment An *innuendo* is explanatory of the subject-matter sufficiently explained before, and it is explanatory of such matter only; for it cannot extend the sense of the words beyond their own meaning unless something is put upon the record for it to explain. (Van Vechten *v.* Hopkins, 5 Johns. 220; see *post*, §§ 308, 323, 335.)

It seems that in some instances where the language is unambiguous on its face, the plaintiff will not be allowed to treat it as ambiguous, and give it a meaning different from that it ordinarily bears. Thus the words spoken of a dyer were: "Thou art not worth a groat." The plaintiff alleged that at E., where the words were spoken, they were all one as calling him bankrupt. The court held the averment idle, because the words in themselves imply a plain and intelligible sense. (Meade *v.* Axe, Mar. 15, pl. 37.) "It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning." (McCluskey *v.* Cromwell, 11 N. Y. 601; Bartlett *v.* Robinson, 6 Trans. App. 166.)

as published without any lawful excuse, and as not to be believed or considered as true unless its truth be established; or, as the phrase is, such language is presumed to be malicious and false. But as to language concerning a thing, no such presumption is indulged; and upon those who allege language concerning a thing to be false and malicious is the burden of establishing those conclusions by other evidence than that afforded by a mere publication of the language. And besides, to give a cause of action for language concerning a thing, damage, general or special, must in all cases be alleged and proved.[1]

While a distinction has been recognized between language concerning a person and language concerning a thing, the essential grounds of the distinction seem not to have been clearly, nor indeed rightly, apprehended. That branch of the law of libel known as "slander of title," has been regarded as something distinct from slander and libel, properly so called, whereas in reality slander of title is but a portion of that division of the law relating to wrongs by language which includes language concerning things.[2] The

[1] See Swan *v.* Tappan, 5 Cush. 104; Ingram *v.* Lawson, 6 Bing. N. C. 212; 8 Scott, 571; Evans *v.* Harlow, 5 Q. B. 624; Kendall *v.* Stone, 5 N. Y. 14; rev'g S. C. 2 Sand. 269; Hargrave *v.* Le Breton, 4 Burr. 2422; Smith *v.* Spooner, 3 Taunt. 246; Bailey *v.* Dean, 5 Barb. 297; Linden *v.* Graham, 1 Duer, 670; Tobias *v.* Harland, 4 Wend. 537; McDaniel *v.* Baca, 2 Cal. 326; Hamilton *v.* Walters, 4 Up. Can. Q. B. Rep. O. S. 24; *post*, § 205.

[2] Debated if *slander of title* within the statute (21 Jac. I, ch. xvi), actions on the case *for slander*, held by three judges against one, that it was not; that "action on the case for slander" referred to the person of a man and not to the title of lands. For this is not properly a slander, but a cause of damage. (Lowe *v.* Harwood, Cro. Car. 140.) "An action for slander of title is not properly an action for words spoken or libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the digests and other writers on the text law, and is so held by the courts at the present day. Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Scott, 723." (Heard on Libel. § 59.) "An action of slander of title is a sort of metaphorical expression." (Maule, J., Pater *v.* Baker, 3 C. B. 831.) "The cause of action is denominated slander of title by a figure of speech, in which the title to land is personified and make subject to many of the rules applicable to personal slandar, when the words in themselves are not actionable." (Gardiner, J., Kendall *v.* Stone, 5 N. Y. 14; see *post*, note to § 150.)

rules relating to slander of title apply to all language concerning things, but where the language concerns both a person and a thing, it is governed by the rules which relate to language concerning the person. The question whether the language concerns a person or a thing arises in cases of alleged privileged publications in the form of criticisms on books, works of art, or places of public entertainment. It must be determined in those cases whether in point of fact the language of the criticism was concerning the thing: the book, the work of art, the entertainment, or concerning the person: the author, the artist, or the proprietor of the place; and according to the decision of that question may the language be, or not be, actionable. We shall advert to this hereafter, in treating of the actionable quality of language concerning things, and of defenses (§§ 203, 207, 254).

§ 131. What person or what thing the language concerns is material; as upon the answer to this question depends whether the party complaining has, or has not, any right to redress.[1] Of course unless the language concerns either the person or the affairs of the person complaining, no wrong can have been done him of which he can rightfully complain.[2] (§§ 310, 316, 343.)

[1] A complaint which does not allege that the defamatory matter was published of and concerning the plaintiff is bad on demurrer. (McCallum *v.* Lambie, 145 Mass. 234.)

[2] In an action for scandalous words, it is requisite that "the person scandalized be certain." (James *v.* Rutlech, 4 Coke, 17.) "No writing whatever is to be esteemed a libel unless it reflects upon some particular person." (Hawk. P. C., ch. 79, § 9.) After quoting the foregoing sentence, Holt (Holt on Libel, 246) adds: "This is unquestionably true, as it relates to the action on the case for slander, in which the party complaining must show himself to be meant by the libel." (Holt on Libel, 247; Harvey *v.* Coffin, 5 Blackf. 566.) It is not material whether the person is described nominally or indirectly, provided his identity be ascertained. (Sumner *v.* Buel, 12 Johns. 475.) Identity is presumed from identity of name. (Jackson *v.* Goes, 13 Johns. 518; Jackson *v.* King, 5 Cow. 237; Jackson *v.* Cody, 9 Cow. 140; Hamber *v.* Roberts, 18 Law Jour. Rep. N. S. 250 C. P.; 7 C. B. 861; Sewell *v.* Evans, 4 Q. B. 626; Simpson *v.* Dismore, 9 M. & W. 47; 1 Dowl. P. C. N. S. 357; Hatcher *v.* Rocheleau, 18 N. Y. 86; but see Jackson *v.* Christman, 4 Wend. 277; Whitelocke *v.* Musgrove, 1 C. & M. 511; Jones *v.* Jones, 9 M. & W. 75; Green-

§ 132. When the language concerns a person, it is material further to inquire whether it concerns him as an

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shields *v.* Crawford, *Id.* 314; 1 Dowl. P. C. N. S. 439.) Where the language is not applicable to the plaintiff (does not concern the person) no averment or innuendo can make it so. (Solomon *v.* Lawson, 8 Q. B. 823; Ingram *v.* Lawson, 6 Bing. N. C. 212; 8 Scott, 571; Dottarer *v.* Bushey, 16 Penn. 208; Swan *v.* Tappan, 5 Cush. 104; Vin. Abr. Act. for Words, H. *b*, 12, 13; Sanderson *v.* Caldwell, 45 N. Y. 398.) Where the language is applicable to the plaintiff, although not so upon its face, to maintain an action therefor, he must, by *averment*, introduce such facts as make it apparent that persons who knew him would, on hearing or reading such language, perceive its application to him. (Miller *v.* Maxwell, 16 Wend. 9.) He cannot show the application of the language to himself by an innuendo alone. (Wilson *v.* Hamilton, 9 Rich. Law [So. Car.], 382; Maxwell *v.* Allison, 11 S. & R. 343; Turner *v.* Merryweather, 7 C. B. 251; Tyler *v.* Tillotson, 2 Hill, 507; see § 343, *post.*) Thus, it is not sufficient to allege that the defendant said, "R. saw a *young man* (meaning the plaintiff) ravishing a cow." (Harper *v.* Delp, 3 Ind. 225.) Or, W. *or somebody* altered the indorsement on a note. (Ingalls *v.* Allen, Breeze, 233.) I know of but one man who owes me enmity enough to do such a thing, and you know whom I mean. (Robinson *v.* Drummond, 24 Ala. 174.) A. was supervisor of an election, at which there was false swearing. (Lewis *v* Soule, 3 Mich. 514.) And held that the postmaster of J. could not maintain an action for words spoken of a missing letter containing the resignation of one M.: "I do not think M.'s resignation has gone to Washington. I have no doubt it was embezzled at J." (Taylor *v.* Kneeland, 1 Doug. 67.) For the words, "All the bravery you (A.) ever showed was sleeping with your sisters," held that the sisters of A. could not sue. (Mallison *v.* Sutton, 1 Smith [Ind.], 364.) For calling W. a bastard, the mother of W. could not sue for the imputation upon her without proper averments connecting the allegation with her. (Maxwell *v.* Allison, 11 S. & R. 343; Hoar *v.* Ward, 47 Vt. 657.) An action may be supported for language in which the plaintiff is described directly or indirectly, though his name is not given, in which case the whole of the publication must be considered, in determining whether the averments be sufficient to make it applicable to the plaintiff. (Cook *v.* Tribune Association, 5 Blatch. C. C. 352.) With proper averments showing the plaintiff to be intended, one may bring an action for words concerning on their face "his *friend*" (Clark *v.* Creitzburgh, 4 McCord, 491); or the "surgeon of whiskey memory" (Miller *v.* Maxwell, 16 Wend. 9); or the "man at the sign of the Bible" (Steele *v.* Southwick, 9 Johns. 214); or O. B. (O'Brien *v.* Clement, 16 M. & W. 159); or "desperate adventurers" (Wakley *v.* Healey, 18 Law Jour. 241, C. P.); "the writer in the *Register* who was deprived of a twopenny justiceship for malpractice in packing a jury" (Mix *v.* Woodward, 12 Conn. 262); and see "One who edits the *Times*" (Tyler *v.* Tillotson, 2 Hill, 507); "Filly Horse" (Weir *v.* Hoss, 6 Ala. 881); Goody Two Shoes, meaning Nancy Irwin (The People *v.* Chace, 1 Miss. St. Cas. 30); By George the old Liar (Johnson *v.* Com'wealth, 13 Cent. Rep. 80); the Pilot; which Pilot is a question for the jury (Lyons *v.* Townsend, 2 Edmonds Sel. Cas. 452). Where B. had been accused of stealing a tray of biscuits, and A. said in the hearing of B. and of other persons, that if they did not look out he would make the tray of biscuits roar, held, that with proper averments connecting B. with this language of A., B. might maintain an action against A. (Briggs *v.* Byrd, 11 Ired. 353.) The words "I am a true subject, and thou servest no true subject," spoken to the servant of I. S., held sufficient to give a right of action to I. S. (Vin. Abr. Act. for Words, C, b, 1.) And so of the words, "Thy master, Mr. Browne, hath robbed me."

individual merely, or in some acquired capacity, as in an office, trade or profession, because language which would

(*Id.* 3.) If A. says to B., One of us two is perjured, and B. say to A., It is not I, and A. says again, It is not I, B. may maintain an action. (*Id.* 4; Coe *v.* Chambers, 1 Rolle Abr. 75.) For the words "Thy son hath robbed" me, the son of the person spoken to may maintain an action if he be the only son; and if one say to a son, thy father, or to a wife, thy husband hath robbed me, the father or the husband may have an action. (Vin. Abr. Act. for Words, C, b, 6; H, b; K, b; and see Ralph *v.* Davye, Sty. 150; Brent *v.* Ingram, Cro. Eliz. 343.) Barker, that was the name of his reputed father, his mother's name was not Barker, gives a right of action to the mother. (Anderson *v.* Stewart, 8 Up. Can. Rep. Q. B. 243.) For the words "Your boys stole my corn," "Your children are thieves," either of the sons in the one case, and of the children in the other, may sue. (Maybee *v.* Fisk, 42 Barb 326; Gidney *v.* Blake, 11 Johns. 59; and see Henacre *v.* Vt., 1 Keb. 525; Crane *v.* O'Reilly, 11 N. Y. St. Rep. 277.) For the words, A. or B. killed T. S., either A. or B. may sue. (Falkner *v.* Cooper, Carth. 56.) Where several are included in the same libel, they may each maintain a separate action. (Smart *v.* Blanchard, 42 New. Hamp. 137; Ellis *v.* Kimball, 16 Pick. 132.) Where the language affects a particular class of men, as, for instance, men of the gown, it gives no right of action to an individual of that class. (Ryckman *v.* Delavan, 25 Wend. 186; rev'g White *v.* Delavan, 17 Wend. 49; and see Ellis *v.* Kimball, 16 Pick. 132; Le Fanu *v.* Malcolmson, 1 Ho. of Lords Cas. 637.) Thus, where Ensign Sumner brought an action against Buel for defamatory matter published by Buel, reflecting on the character of the officers generally of the regiment to which the plaintiff belonged, it was held by a majority of the court that the action could not be maintained, and that the appropriate remedy in such a case was indictment. (Sumner *v.* Buel, 12 Johns. 475.) An information may issue in such a case. (See Rex *v.* Baxter, 12 Mod. 139; 2 Ld. Raym. 879; Rex *v.* Osborne, 2 Barnard. 138; Kel. 230, pl. 183; Rex *v.* Griffin, Rep. temp. Hardwicke, 39; Rex *v.* Horne, Cowper, 672; Holt on Libel, 249; Cooke on Defamation, 215.) In Scotland, under the circumstances of the case, a civil suit was sustained by a lieutenant colonel, in behalf of his regiment, for calling the regiment a regiment of cowards and blackguards. (Shearlock *v.* Beardsworth, 1 Murray's Rep. of Jury Cas. 196; and see Palmer *v.* City of Concord, 48 N. H. 211.) Where the defamatory matter is concerning a class, as an unincorporated fire company, the members of the class cannot maintain a joint action. (Giraud *v.* Beach, 3 E. D. Smith, 337.) A man may be libeled, not by name, or any specific description of himself, but under some such description of persons as includes him with others—as all the brewers in a designated portion of a city. (Ryckman *v.* Delavan, 25 Wend. 186; rev'g White *v.* Delavan, 17 Wend. 49; and see Le Fanu *v.* Malcolmson, 1 Ho. of Lords Cas. 637.) A statement that the entire staff of harness-makers, New York Fire Department, had been dismissed for thefts of leather, any one of the staff might sue. (Ryer *v.* Fireman's Journal Co. 11 Daly, 251.) And "a scandal published of three or four, or any one or two of them, is punishable at the complaint of one or more of all of them." (Holt on Libel, 247; Harrison *v.* Bevington, 8 C. & P. 708.) Thus, where there was an indictment against sixteen persons for conspiracy, and I. S. said the defendants were those who helped to murder W. N., held, either of the sixteen defendants might have his action. (Vin. Abr. Act. for Words, C, b, 5; and see Forbes *v.* Johnson, 11 B. Mon. 48; Strauss *v.* Meyer, 48 Ill. 385; Chandler *v.* Holloway, 4 Port. 17; and see Parties, *post.*) And where the charge was against the deputy lieutenants engaged in suppressing a riot, held one of such lieutenants might sue. (Morthland *v.* Cadell, 4 Paton, 385;

not be actionable if it concerned one as an individual merely, may be actionable if it concerns him in his office, trade, or profession (§ 179).

§ 133. The different effect which in certain cases is attributed to *written* as distinguished from *oral* language, does not extend to the construction of language with a view to determine its proper meaning.[1] For the purpose

Boyd Kinnear's Dig. of H. C. Cas. 227.) But where the allegation was that a number of articles had been put into the market, and fraudulently sold as antiquities, held that a dealer in antiquities could not maintain an action. (Eastwood *v.* Holmes, 1 Fos. & F. 347.) Where the intention to apply defamatory remarks to the prosecutor is rendered doubtful and ambiguous by the defendant having left blanks for names, or from his having given merely the initials or introduced fictitious names, it is always a question for the opinion and judgment of the jury whether the prosecutor was the party really aimed at. (2 Starkie on Slander, 32; The State *v.* Jeandell, 5 Harring, (Del.) 475: Mix *v.* Woodward, 12 Conn. 262; Ryckman *v.* Delavan, 25 Wend. 186.) For this purpose the judgment and opinion of witnesses who, from their knowledge of the parties and the circumstances, are able to form a conclusion as to the defendant's intention and application of the libel, is evidence for the information of the jury. (2 Starkie on Slander, 321.) And he adds in a note: Lord Ellenborough held that the declarations of spectators while they looked at a libelous picture, publicly exhibited in an exhibition room, was evidence to show that the figures portrayed were meant to represent the parties alleged to have been libeled. (Du Bost *v.* Beresford, 2 Camp. 512; and see Starkie on Evidence, part iv, p. 861.) Where the plaintiff proved that the defendant spoke certain words of her, by the name of Mrs. Edwards, the defendant was not allowed to show that, in other conversations, he had used similar words respecting another Mrs. Edwards. (Patterson *v.* Edwards, 2 Gilman, 720.) In New York, a witness is not allowed to state his conclusion from the facts as to the intention of the defendant to apply the words or libel to the party or circumstances as alleged. (Van Vechten *v.* Hopkins, 5 Johns. 211; Gibson *v.* Williams, 4 Wend. 320; The People *v.* Parr, 25 Week. Dig. 113; § 375, *post.*) In some other States witnesses have been allowed to testify as to the sense in which they understood the words, and the application of the words to the plaintiff. (Morgan *v.* Livingston, 2 Rich. 573; Miller *v.* Butler, 6 Cush. 71; Leonard *v.* Allen, 11 Cush. 241; McLaughlin *v.* Russell, 17 Ohio, 475; Goodrich *v.* Davis, 11 Metc. 473; Goodrich *v.* Stone, 11 Metc. 486; Allensworth *v.* Coleman, 5 Dana, 315; White *v.* Sayward, 33 Maine, 322; Mix *v.* Woodward, 12 Conn. 262; Smart *v.* Blanchard, 42 N. H. 137; Smawley *v.* Stark, 9 Ind. 386; Tompkins *v.* Wisener, 1 Sneed, 458; Commonwealth *v.* Buckingham, Thatcher's Crim. Cas. 29.) But the rule adopted in New York appears to have been followed in Snell *v.* Snow, 13 Metc. 278; Rangler *v.* Hummell, 37 Penn. St. Rep. [Wright], 130; McCue *v.* Ferguson, 73 *Id.* 333; Briggs *v.* Byrd, 11 Ired. 353; Pittsburgh R'y Co. *v.* McCurdy, 6 Cent. Rep. 719; 35 Alb. L. J. 202.) How the hearers understood the words is for the jury. (McLaughlin *v.* Bascom, 38 Iowa, 660; § 384, *post.*)

[1] In Edsall *v.* Brooks, 3 Robertson, 295, it is said: "Although greater liberality seems to be exercised in the case of words when they are spoken than when they are contained in written or printed articles, yet in both cases it must be one of intent; of

of its construction, language is to be regarded not merely in reference to the words employed, but according to the sense or meaning which, all the circumstances of its publication considered, the language may be fairly presumed to have conveyed to those to whom it was published. The language is always to be regarded with reference to what has been its effect, actual or presumed, and the sense is to be arrived at with the help of the cause and occasion of its publication.[1] The court or the jury is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language in question according to its natural and popular construction.[2]

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course a person must be presumed to have used words in their ordinary import among those who speak the language to which such words belong, in the community in which they are uttered or published, but if they have acquired by local usage a different meaning, it must be presumed that they were used to convey the ideas attached to them by such usage, and such meaning may be alleged as a fact in the pleadings, and the evidence upon it may be passed upon by the jury. The meaning of all words in the English language is not everywhere the same, and the only criterion of the meaning of them, as used on any occasion, is the understood meaning in the community, society or individuals to whom they were addressed; it is only when understood in that sense they do the party at whom they are aimed any injury."

[1] In actions for words we are to consider the words *themselves* and the *causa dicendi*, for sometimes in the first case they will bear an action, and yet when the *causa dicendi* is considered they will not. (Barclay, J., Mar. 20, p. 45.) "In case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking them; for *sensus verborum ex causa dicendi accipiendus est.*" (4 Co. 18.) The construction which it behooves a court of justice to put on a publication which is alleged to be libelous, is to be derived as well from the expression used, as from the whole scope and apparent object of the writer. (Spencer *v.* Southwick, 11 Johns. 592; Mason *v.* Stratton, 17 N. Y. St. Rep. 302.)

[2] "Words are now construed by courts as they always ought to have been in the plain and popular sense in which the rest of the world naturally understand them." (Roberts *v.* Camden, 9 East, 93.) "It is quite clear, from all the modern authorities, that a court must read these words in the sense in which ordinary persons, or in which we ourselves, out of court, reading this paragraph, would understand them." (Tenterden, C. J., Harvey *v.* French, 1 Cr. & M. 11.) We cannot pervert the words and alter the ordinary construction of them. (Bonyon *v.* Trotter, Sty. 231.) The words must be understood by the court in the same sense in which the rest of mankind would ordinarily understand them. (Woolnoth *v.* Meadows, 5 East, 463; Spencer *v.* Southwick, 11 Johns. 579.) We "ought to expound words according to their general signification" (Pratt, C. J., Button *v.* Heyward, 8 Mod. 24); or acceptation (Fallenstein *v.* Boothe, 13 Mo. 429; Ogden *v.* Riley, 2 Green, 186); their popular sense (Duncan *v.* Brown, 15 B. Mon. 186; Hancock *v.* Stephens, 11 Humph. 507); their most

r a cause of action for
e affirmative,[1] and that
h inferences,[2] but nega-
shown to be in fact
e like effect as affirma-
evaded by any of the

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e of the offensive meaning attri-
to them; (2) that the defendant
fact, use them in that sense."
rkie on Slander, 44.) "Words
ing crime must be precise." (*Id.*)
te to § 142, *post*.

Words calculated to induce the
rs to suspect that the plaintiff
guilty of the crime alleged, are
iable. (Drummond *v.* Leslie, 5
f. 453.) It is not necessary that
words in terms should charge a
c. If such is the necessary in-
ce, taking the words altogether
their popular meaning, they are
nable. (Morgan *v.* Livingston, 2
573; Cass *v.* Anderson, 33 Vt.
Colman *v.* Godwin, 3 Doug. 90;
& Cr. 285; Commonwealth *v.*
els, 10 Mass. 518.) "A libel in
eglyphics is as much a libel as an
invective. Not only an allegory
rebus or an anagram may be a
" (Holt on Libel, 245; Sunder-
Bradstreet, 46 N. Y. 188.) The
that is painted with a fool's cap
at, or with horns, or whose pic-
s drawn with asses's ears, is cer-
y abused. (1 Wood's Inst. 445;
on Libel, 244; Du Bost *v.* Beres-
2 Camp. 512; Mezzara's Case, 2
Hall Recorder, 113, *ante*, p. 3. n. 1.)
I know what I am, and I know
Snell is; I never buggered a
." These words held to import
arge of buggery against Snell.
v. Webling, 2 Lev. 150.) But
ords, "I never came home and
ed my wife," held not capable of
construed as a charge that the
to whom the words were address-
d gone home and poxed his wife.
k *v.* Dier, 8 Mod. 290.) And so
ords, "A man that would do that
d steal," held not to amount to a
e of stealing. (Stees *v.* Kemble,
nn. St. Rep. 112.)

artful and disguised modes in which men attempt to conceal libelous or slanderous meanings;"[1] and the fact of language being ungrammatical, or such as is not usually found in any dictionary,[2] will not suffice to prevent the

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The defendant wrote a pamphlet called "Advice to the Lord Keeper, by a Country Parson," wherein he would have him love the church as well as the Bishop of Salisbury, manage as well as Lord Haversham, be brave as another Lord, &c. The defendant was found guilty, and upon motion in arrest of judgment, it was urged that no ill thing was said of any person, and all he said was good of them; but by the court the words were laid to be *ironical*, and the jury found them to be so, and the motion was refused. (Reg. *v.* Browne, Holt, 435; 11 Mod. 86; recognized, Andrews *v.* Woodmansee, 15 Wend. 232; Boydell Jones, 4 M. & W. 446; 7 Dowl. Pr. Cas. 210.) So where the words were, "You will not play the Jew nor the hypocrite" (Rex *v.* Brown, Popham, 139; Hob. 215); "An honest lawyer" (Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. P. C. 210), they being alleged to have been spoken ironically, and so found by the jury, held to be actionable. "Sober moments" may impute drunkenness. (Sanderson *v.* Caldwell, 45 N. Y. 398.)

[1] Shaw, Ch. J., Commonwealth *v.* Child, 13 Pick. 198. The court will regard the use of fictitious names and disguise in a libel in the sense that they are commonly understood. (The State *v.* Chace, Walk. 384.) "If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import; and the sense in which it was intended is to be gathered from the context and from all the facts and circumstances under which it was used." (Shaw, Ch. J., Commonwealth *v.* Kneeland, 20 Pick. 206; and see Vanderlip *v.* Roe, 23 Penn. State Rep. [11 Harris], 82.) "One half of the English language is interpreted by the context." (Alderson, B., Dellevene *v.* Percer, 9 Dowl. P. C. 245.)

A defamatory writing expressing only one or two letters of a name, in such a manner that from what goes before and follows after it must necessarily be understood to signify a certain person, in the plain, obvious, and natural construction of the whole, is to be understood as if the same were written in full. (Reg. *v.* Hurt, Hawk. Pl. Cr. 194; Rex *v.* Woodfall, Lofft, 776; Roach *v.* Read, 2 Atk. 469; Holt on Libel, 243.) If in a libel asterisks be put instead of the name of the party libeled, it is sufficient that the plaintiff should be so designated that those who knew him may understand that he is the party meant. It is not necessary that all the world should understand that the plaintiff is the party intended. (Bourke *v.* Warren, 2 C. & P. 307; and see in note 1, p. 120, and note 2, p. 113, *ante*.)

[2] One "cannot protect himself from an action by the mere grammatical structure of the phrase." (Cowen, J., Cornelius *v.* Van Slyck, 21 Wend. 70.) "The etymology of words, or the grammatical construction of sentences, will be fallacious if followed as the only guides in the interpretation of language." (Borthwick on Libel, 142.) "Here is three *cockels* in this place we *now* them well, he is a *nave*, he cheats and *rongs* the country, and is the cur of a son of a whore." The indictment for these words was demurred to, because the words were not intelligible, but the court overruled the demurrer, and said "it would be hard that a court of justice must not understand what is *spelt* badly, when all the world besides makes no scruple to find the signification of the words." (Rex *v.* Edgar, 2 Sess. Cas. 29, pl. 33.) "Common sense is not to be deemed a stranger to legal process, but as very influential in ascertaining

age, or of the meaning

rged to be defamatory

son, 29); "Bushwhacker v. Collins, 37 Mo. 324). The es not take notice of what a er" is (Walcott *v.* Hind, 4); or the meaning of "tan " (Day *v.* Robinson, 1 Ad. &). "Woolcomber" held not to innuendo to show it means o buys wool to work with. Lofft, 322.) "Truckmaster," said not to be found in any ary, was used without an in- ; it was left to jury to decide in libelous sense. (Homer *v.* n, 5 Hurl. & Nor. 661.) Doubt- e term "swindler" was one of the court would take judicial (I'Anson *v.* Stuart, 1 T. R. ut see Forrest *v.* Hanson, 1 Cr. 3, and *post*, note to § 174.) The refused to take notice that *ad*" is sometimes used to mean " (Hays *v.* Mitchell, 7 Blackf. or "*goose-house*" to mean *el*" (Dyer *v.* Morris, 4 Miss. Bogtrotter may be explained by e. (Omalley *v.* Elder, 2 Vict. , Law.)

court is to inform itself of the g of English words, although al and peculiar to a particular Parke, B., McGregor *v.* Gregory, l. N. S. 769; 11 M. & W. 287; Dig. Act. for Defam. C), as of felons (Rolle Abr. 86); or words (Hobart, 126), *Daffa-dilly*, by averment meaning *dexter* (Pearce's Case, Cro. Car. and where particular English have acquired some sense dif- from their natural one, an aver- by way of inducement of that d sense is necessary; an in- without such an averment be insufficient (McGregor *v.* y, 2 Dowl. N. S. 769); so held terms *black sheep* and *black d.*); Baby farming (Ramscar y. 16 N. Y. St. R. 789); and tes 1, p. 122, and 4, p. 126,

has any reference to, or is connected with, any other language or event, which affects its meaning or effect, it must be construed in relation to such other language or event.[1] and this, although on the face of the alleged defamatory matter there is no reference to any other language or event.[2] In the absence, however, of any allegation or proof to the contrary, matter which has on its face no reference to any other language or event, will not be presumed to have any such reference, and must be construed as standing alone.[3]

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[1] But a circular issued by a commercial agency, containing the names of the plaintiff, his address and business followed by asterisks with the reference at its foot, "for explanation please call at our office," was held not capable of a construction which was actionable. (Kingsbury *v.* Bradstreet Co. 35 Hun, 212; and see note to this case.)

[2] Tighe *v.* Cooper, 7 Ell. & Bl. 639; § 126, *ante*. The defendant has always been permitted, by way of defense, to show the matter affecting the meaning of the alleged defamatory matter, as in an action for calling plaintiff a murderer, it may be urged that the words were used in the course of a conversation about unlawful hunting, and merely imported that plaintiff was a murderer of hares. (4 Co. 14.) So where the charge was maintenance, defendant might show that lawful maintenance was intended. (Cro. Jac. 90; Kinnersly *v.* Cooper, Cro. Eliz. 168; and see Brittridge's Case, 4 Cro. 18.) A charge of theft explained. (Hawn *v.* Smith, 4 B. Monroe, 385.) Action cannot be maintained where the words, although imputing a crime, where accompanied by such an explanation as showed they referred to an innocent transaction. or in law could not have constituted a crime, or were then understood by all the hearers as referring to such a transaction. (Hayes *v.* Ball, 72 N. Y. 418.) The words "wanted E. B. Z., M. D., to pay a drug bill," are not libelous on their face, but they may become libelous from the circumstances under which they are published. (Zier *v.* Hoflin, 21 No. West. Rep. 862, Minn.) And where defendant charged plaintiff with the commission of an offense, but alleged that plaintiff was insane at the time: *Held*, that, although otherwise actionable, yet as insanity would be an excuse for the offense, the charge was not actionable. (Abrams *v.* Smith, 8 Blackf. 95; *post*, § 248.)

[3] Explanatory circumstances known to both parties, speaker and hearer, are to be taken into the account as part of the words. (Dorland *v.* Patterson, 23 Wend. 422; citing Andrews *v.* Woodmansee, 15 *Id.* 232; Miller *v.* Maxwell, 16 *Id.* 9; Heming *v.* Power, 10 M. & W. 569; and see Hankinson *v.* Bilby, 2 Car. & Kir. 440; 16 M. & W. 446; Perry *v.* Mann, 1 R. I. 263; Foval *v.* Hellett, 10 Bradw. (Ill.) 265.) Words otherwise actionable explained at the time of publication by referring to a known and particular transaction are to be construed accordingly. (Van Rensselaer *v.* Dole, 1 Johns. Cas. 279; Aldrich *v.* Brown, 11 Wend. 596; Trabue *v.* Mays, 3 Dana, 138; Emery *v.* Miller, 1 Denio, 208; Thompson *v.* Bernard, 1 Camp. 48; Shecut *v.* McDowell, 3 Brevard, 38; Cristie *v.* Cowell, Peake, 4; Pegram *v.* Styron, 1 Bailey, 595; Hodgson *v.* Bulpit, 6 Vict. L. R. 440, Law.) Words which do not necessarily import anything injurious, may do so when taken in connection with other charges (Beardsley *v.* Tappan, 1 Blatchf. C. C. R

It is impossible to anticipate or catalogue all the circumstances which may affect the meaning of language, but among them are the circumstances of time, place, and usage,[1] and some others to be presently mentioned.

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588), or according to the common understanding of them. (Cooper *v.* Perry, Dudley, 247.) The defendant may show the language related to some transaction (Ceeley *v.* Hoskins, Cro. Car. 509; Norton *v.* Ladd, 5 N. H. 203), or was uttered in connection with other words, which controlled its meaning. (Stevens *v.* Handly, Wright, 123; Williams *v.* Cowley, 18 Ala. 206; Hays *v.* Mitchell, 7 Blackf. 117; Harrison *v.* Findley, 23 Ind. 265; Robinson *v.* Keyser, 2 Foster [N. H.], 323.)

Where the language is *prima facie* actionable, the burden is on the defendant to show that it is not actionable. (2 Starkie on Slander, 85; Penfold *v.* Westcote, 2 N. R. 335; Cristie *v.* Cowell, Peake's Cas. 4; Sel. N. P. 1250; Bissell *v.* Cornell, 24 Wend. 354; Watson *v.* Nicholas, 6 Humph. 174.)

[1] "Libel . . . has been variously construed at various times; being a mere legal reason, and therefore variable not only according to all the circumstances of the times, but according to the ability and information of the judges. In ignorant and despotic times it had not the same limits and precision as in the days of liberty and science." (Holt on Libel, 43.) "In judging of the meaning of language, our juries have been directed to attend to the criteria of the time, the place, when and where, and the persons by and to whom the language has been employed." (Borthwick on Libel, 142.) "It would be no excuse, having applied an insulting epithet to any one, if we should afterwards plead that, tried by its etymology and primary usage, it had nothing offensive or insulting about it, although indeed Swift assures us that in his time such a plea was made and was allowed. "I remember," he says, "at a trial in Kent, where Sir George Rooke was indicted for calling a gentleman 'knave' and 'villain,' the lawyer for the defendant brought off his client by alleging that the words were not injurious, for 'knave,' in the old and true signification, imported only a servant, and "villain,' in *Latin is villicus*, which is no more than a man employed in country labor or rather a baily." (Trench's English, Past and Present.) The words published should be construed in the sense in which they are understood by those who read them. An obsolete or antiquated and practically unused meaning of words, cannot be searched for and studied out, to show that at some remote period of history, they were not opprobrious in order to shield a person publishing and using them. (Robertson *v.* Bennett, 44 N. Y. Superior Ct. [J. & S.] 66.)

"Precedents in actions for words are not of equal authority as in other actions; *norma loquendi* is the rule for the interpretation of words, and this rule is different in one age from what it is in another. The words which a hundred years ago did not import a slanderous sense, may now, and *vice versa*." (Harrison *v.* Thornborough, 10 Mod. 196; cited Beardsley *v.* Dibblee, 1 Kerr. 246.) And it is the duty of courts to take notice of the mutations in language. (Vanada's Heirs *v.* Hopkins, 1 J. J. Marsh. [Ky.] R. 287.) This was done. (Walden *v.* Mitchell, 2 Vent. 265.) "The precedents in Croke's reports are beginning to be considered apocryphal." (Gibson, J., Bash *v.* Sommer, 20 Penn. St. R. 159.) "Many of those cases [in Cro. Jac. and Cro. Car.] could not be supported at the present day. I do not mean to cast any doubt upon the cases quoted from Bacon's Abridgment and Comyn's Digest." (Pollock, C. B., Tozer *v.* Mashford, 6 Ex. 539; and see Beardsley *v.* Dibblee, 1 Kerr, 260; Foster *v.* Small, 3 Whart. 143; Bloss *v.* Tobey, 2 Pick. 320.) Bridge-

§ 135. In allowing extraneous circumstances to affect the construction of language, courts inquire whether or not the hearer or reader of the language knew such circumstances. If the hearer or reader was acquainted with those extraneous circumstances, the construction will be with reference to them, not because it is important how the hearer or reader understood the language, but because those circumstances form a proper element in determining the meaning to be attributed to the language in ques-

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man, Ch. J., said he was not satisfied to go by precedents, because he held that to be scandalous now which was not twenty years ago. That it is use makes words have force, and words that are actionable now hereafter may not be so. (Carth. 55.) "The opinions of later times have been in many instances different from those in former days in relation to words." (Holt, Ch. J., Baker *v.* Pierce, 6 Mod. 23.) Common sense differs in different ages. What was born in the schools passes by degrees into the world at large, and becomes the property of the market and the tea-table (Coleridge, Biographia Literaria, vol. 1, p. 84, ed. 1847), and to the effect that there is more truth in the general acceptation than in the etymology of terms. (See Guizot Hist. *de la* Civilis. *en* Europe, vol. 1, p. 10, ed. 1846; Cousin Hist. *de la* Philosophie, vol. 2, p. 221, ed. 1846.) It is necessary to attend to the circumstances and history of the times in which the libel was published. They tend to explain the motives which induced the publication and the meaning of the libel itself. It is impossible for the court or jury to shut their ears against the history of the times. (Per L'd Kenyon, cited in trial of Arth. H. Rowan, 1794.)

In the time of Charles the Second of England, it was held actionable to call one a Papist or to say he went to mass (Row *v.* Clargis, 1 Ld. Raym. 482; 2 Salk. 696; Walden *v.* Mitchell, 2 Vent. 265; Cutler *v.* Friend, 2 Show. 140); but held otherwise in the reign of King James. (Ireland *v.* Smith, 2 Brown, 166.) So in England, to write of one that he was a "*Man Friday*," was held not actionable (Forbes *v.* King, 1 Dowl. P. C. 672; 1 Cr. & M. 435; 2 Law Jour. Rep. N. S. 109 Ex.), for the reason as stated in Hoare *v.* Silverlock, 12 Adol. & El. N. S. 624, that being a black man might be a great misfortune, but was no crime; while in the United States it has been held actionable to call one a mulatto. (King *v.* Wood, 1 N. & M. [So. Car.] 184; Eden *v.* Legare, 1 Bay, 171; Atkinson *v.* Hartley, 1 McCord, 203; *contra*, Barrett *v.* Jarvis, 1 Ham. 83, note; see Borthwick on Libel, 176; Mills' Logic, bk. iv, ch. v.—The history of variations in the meaning of terms.)

The word "*screwed*," or "*strained*," does not of itself import sexual intercourse, but in certain localities it may have that import. (Coles *v.* Haveland, Cro. Eliz. 250; Miles *v.* Van Horn, 17 Ind. 245; Rodebaugh *v.* Hollingsworth, 6 Ind. 339; Vin. Abr. Act for Words, L, *b*, 7.) She is getting fat, held to mean she is pregnant (Emmerson *v.* Marvel, 55 Ind. 265), and so of she is in a fix (Acker *v.* McCullough, 50 Ind. 447; and see Wilson *v.* Barnett, 45 Ind. 163). In London, England, *pimp* signifies *common bawd*. (Dymmock *v.* Fawset, Cro. Car. 393, pl. 5.) *Healer of felons* means, in some localities, *aider of felons; limir* means *thief*, and *outputter* means *receiver of felons* (Vin. Abr. Act. for Words, L, *b*, 1, 6,) and see *Id.* 4, 7, as to the word *champertor* and the phrase *cut him out of doors;* and see note 1, page 120, *ante*.)

tion. If the hearer or reader was not acquainted with those extraneous circumstances, then they will not be taken into consideration in determining the meaning of the language. The hearer or reader not being acquainted with those circumstances which affect the meaning of the language, its effect upon such hearer or reader is as if no such circumstances existed, and the language is to be construed without reference to such circumstances. The circumstance that the act charged is physically or legally impossible, does not always prevent the language being actionable. The alleged test in such a case is the knowledge possessed by those to whom the language is published. Thus where the defendant attributed to the plaintiff sexual intercourse with a dog, and of having given birth to a litter of pups in consequence of such intercourse, it was held not to be a defense that such a result was impossible.[1]

[1] Kennedy *v.* Gifford, 19 Wend. 296. Courts cannot say judicially whether it be possible for a woman to have connection with a dog, or to have pups by him, but as it is not popularly believed to be impossible, the people not being presumed to know scientific facts, the injury to the plaintiff will be the same in either case, and the action will lie. (Ausman *v.* Veal, 10 Ind. 355; Cleveland *v.* Detweiler, 18 Iowa, 299; Haynes *v.* Ritchey, 30 Iowa, 76.)

"Thou art a bastard-bearing whore, and hadst two bastards." It was objected that these words spoken of a married woman were not actionable, because a married woman cannot have a bastard, but held actionable because they purported that she was not married when she had the bastards. (Stevens *v.* Ask, Sty. 424.)

These words concerning a churchwarden, "Who stole the bell ropes, you scamping rascal?" Not actionable, because the property of the bell ropes was in the plaintiff as churchwarden, and as he could not steal his own property, the words imputed no felony. (Jackson *v.* Adams, 2 Bing. N. C. 402; 2 Scott, 599.) "If a man says to a miller who keeps a corn mill, thou hast stolen three pecks of meal, an action lies; for, although the corn was delivered to him to grind, nevertheless, if he steal it, it is felony, being taken from the rest." (1 Roll's Abr. 73, § 16, cited Nichols *v.* The People, 17 N. Y. 117; and see Hume *v.* Arrasmith, 1 Bibb, 165; and § 169, *post.*)

In an action for slander the words were: "You are a thief; you robbed Mr. L. of £30." The words were spoken in the hearing of B. and of several strangers. B. knew that the words did not mean to impute felony, but meant to impute that the plaintiff had improperly obtained £30 from Mr. L. to compromise an action for a distress: *Held*, that under these circumstances the question to be left to the jury *was not what the defendant meant by the words he spoke, but what reasonable men, hearing the words, would understand by them. Semble*, also, that if *all* the persons present when the words were spoken had known that the words did not impute felony, that would have been an answer to the action. (Hankinson *v.* Bilby, 2 Car. & Kir. 440; 16 M. & W. 442; Bannon *v.* Cleary, 25 N. Y. Weekly

But *semble* that it might have been a defense if it had been shown that the defendant and those who heard the words knew that such a result was impossible.[1]

To charge A. with the murder of B., although B. was alive at the time, would be actionable; but *semble* not so if those to whom the publication was made knew that B. was alive.[2] So, *semble*, one tenant in common of chattels cannot be guilty of larceny of the chattels held in common; and therefore to charge one of several tenants in common with larceny of a chattel held in common, would be actionable, unless those to whom the publication was made

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Dig. 439.) The mere fact that the defendant charged the plaintiff with theft, in regard to an article of property which had been either loaned or sold to the plaintiff, but which sale or loan was not known to those in whose presence he made the charge, will not be a ground of showing either that the act charged was impossible, or that the charge was not seriously made. (Smith *v.* Miles, 15 Vt. 245; and see Dixon *v.* Stewart, 33 Iowa, 125.)

[1] The words were not defamatory in their primary sense, the only part which might have given them a secondary and defamatory meaning, viz., the part that the manager had refused assistance was not known to the persons to whom the circular was addressed. (Capital, &c. Bk. *v.* Henty, 5 C. P. D. 514; aff'd, 7 App. C. 741.)

[2] So held, Sergart *v.* Carter, 1 Dev. & Bat. 8; Snag *v.* Gee, 4 Coke, 16. "You have killed A.; you have poisoned him," are slanderous words, though, at the time they were spoken, A. was living in a distant part of the country. "Eckart *v.* Wilson, 10 S. & R. 44; and see Tenney *v.* Clement, 10 N. H. 52; Carter *v.* Andrews, 16 Pick. 1; Stone *v.* Clark, 21 Pick. [38 Mass.] 51; Stallings *v.* Newman, 26 Ala. 300] "Wilt thou murder my sister as thou didst thy wife?" actionable, although the wife was alive. (Brown *v.* Charlton, Keb. 359, pl. 52.) Imputation of a possible crime actionable, although the charge could not be true. (Rea *v.* Harrington, 2 Atl. Rep. 475 [Vt.], 21 The Reporter, 603.) "Thy father says thou hast murdered thy husband." Judgment was arrested after verdict for plaintiff for these words, because it was not alleged that the husband was dead at the time the words were spoken. (Boldroe *v.* Porter, Yelv. 20.) Words actionable *per se* are not so when spoken of a transaction not amounting to the crime charged, if known to the hearers to be so spoken. (Parmer *v.* Anderson, 33 Ala. 78; Hankinson *v.* Bilby, 2 Car. & K. 440; Carmichael *v.* Shiel, 21 Ind. 66; Perry *v.* Man, 1 R. I. 263; Kennedy *v.* Gifford, 19 Wend. 296; Williams *v.* Stott, 1 Cr. & M. 675; 3 Tyrw. 688; Brite *v.* Gill, 2 Monr. 65; and see *ante*, § 126, note to § 160.) Action for slander in calling plaintiff "a rogue and thief." The parties were neighbors and rival milkmen. Plaintiff annoyed defendant by selling milk outside his shop and loudly assuring his customers it was real, "no chalk and water here;" defendant retaliated by accusing plaintiff of robbing a man out of £50 in reference to the sale of a milk walk. Lord Campbell said there could not be larceny of a milk walk, and directed the jury that if the words declared upon, "rogue and thief," were used merely as indefinite terms of abuse, to find for the defendant.

knew of the tenancy in common.[1] For "if, at the time the words are uttered, there are circumstances (known to the hearers) which clearly show the words are not used in the sense of imputing a felony, then the charge falls to the ground and no action will lie."[2] "Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject."[3]

§ 136. In the case of all oral, and of some written publications, it may be possible to prove whether or not the hearer or reader was acquainted with such extraneous circumstances, but in the majority of cases it would be impossible to make such proof. Some circumstances are of general notoriety that every person is presumed to be acquainted with them, and then all language must be construed in reference to them.[4] With circumstances of less general notoriety, the knowledge of the hearer or reader is in every case a question of proof, and the burden of making

[1] Carter *v.* Andrews, 16 Pick. 1; Stone *v.* Clark, 21 Pick. (38 Mass.) 51; and see note, p. 124, *ante*.

[2] Parke, B., Heming *v.* Power, 10 M. & W. 567.

[3] Hankinson *v.* Bilby, 16 M. & W. 445; and see note to § 140, *post*.

[4] "It is the duty of the jury to construe plain words and clear allusions to matters of universal notoriety, according to their obvious meaning and as everybody else who reads must understand them. But the defendant may give evidence to show they were used on the occasion in question in a different or qualified sense. If no such evidence is given, the natural interpretation of the words and the obvious meaning to every man's understanding must prevail. (Lord Mansfield, Rex *v.* Horne, 2 Cowper, 672.)

"You are a soldier; I saw you in your red coat doing your duty; your word is not to be taken." These words, spoken of an upholsterer, held actionable, it being known to be a common practice for tradesmen to protect themselves from arrest by their creditors by a counterfeit listing. (Arne *v.* Johnson, 10 Mod. 111.)

In an action for *libel* for writing to a client of the plaintiff, a barrister. "He would give her ill counsel and stir up a suit; he would *milk her purse* and fill his own large pockets." per Vaughan, C. J., "Saying he will milk your purse, taken annunciatively, signifies no more than milking a bull; the phrase is not come to an idiom." (King *v.* Lake, 2 Ventr. 18.) Mr. Parry, in his edition of Lord Campbell's Libel Act, says (p. 13) it is doubtful if this decision could now be supported, and we agree with him. (See note, page 120, *ante*.)

such proof rests upon him who claims that the hearer or reader possessed such knowledge.

§ 137. The construction to be put upon any language spoken or written must be that which is consistent with the whole of the speech or writing. Thus the language of any part of a writing is to he construed with reference to the entire writing, and the language of any part of an oral discourse is to be construed with reference to the entire discourse. Hence words which, standing alone, would be actionable, may not be actionable when taken in connection with their context.[1]

§ 138. Formerly the condition in life of the person spoken of materially affected the construction, and words concerning "great men of the realm" were held actionable, which would not have been so held when published concerning private persons. Language defaming these "great men" was called *scandalum magnatum.* In the United States no such distinction of persons is known.[2]

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[1] The sense is to be gathered from the whole of the words or writing. (2 Starkie on Slander, 85; Cooke *v.* Hughes, 1 R. & M. 112; Carter *v.* Andrews, 16 Pick. 1; Cook *v.* Tribune Association, 5 Blatch. C. C. 352.) The construction which it behooves a court of justice to put on a publication is to be derived as well from the expressions used as from the whole scope and apparent object of the writer. (Cooper *v.* Greely, 1 Denio, 358; citing Spencer *v.* Southwick, 11 Johns. 592; Fidler *v.* Delavan, 20 Wend. 57.) "God forbid that a man's words should by strict and grammatical construction, be taken *by parcels*, against the manifest intent of the party upon consideration of all the words which import the true cause and occasion which manifest the true sense of them." (4 Co. 18.) "It seems to me unreasonable," says Brett, L. J., "that where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document." Capital, &c. Bk. *v.* Henty, 5 C. P. D. 514; aff'd, 7 App. Cas. 741.

A defendant should be tried by all that he has published in the same pamphlet or paper. (Morehead *v.* Jones, 2 B. Mon. 210; see *post*, § 278.) Brittridge brought an action for the words, "Mr. Brittridge is a perjured old knave, *and* that is to be proved by a stake parting the lands of Martin & Wright." The judgment was arrested on the ground that the latter words explained the former as not meaning judicial perjury. (4 Co. 18; Yelv. 10, 34; Mo. 666.)

[2] For information as to *scandalum magnatum*, the reader is referred to Starkie on Slander; Holt on Libel. *Secundum gradum dignitatis*, &c., was the rule of the Roman law, and is the rule in Scotland and France. (Borthwick on Libel, 176, 177, n., Inst. Lib. IV, tit. 4; Code Criminel, tit. 111, art. 1; Black. Com. bk. III, c. vii,

How far the condition in life of the parties will affect the damages will hereafter be considered (§§ 391, 417).

§ 139. The sense in which the publisher meant the language cannot be material. The dicta which apparently sanction such a rule will, on a comparison with their context, be found in reality to be, not what did the defendant mean, but what properly may he be taken to have meant. How might the language be understood by those to whom it was published. It cannot, therefore, be correct to say that the language is to be construed in the sense in which the publisher intended it to be understood. "When a party has made a charge that clearly imputes a crime, he cannot afterwards be permitted to say, I did not intend what my words legally imply."[1]

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s. 5; Selwyn's N. P. 1155; Barrington on Penal Statutes; 3 Reeve's Hist. of the Common Law. See note to § 182.)

[1] Woodworth, J., McKinly *v.* Rob, 20 Johns. 351. In an action for libel in calling plaintiff *a skunk*, a charge to the jury, that if the word was intended, as it ordinarily would be to render plaintiff ridiculous and odious, it was actionable, held proper. (Massuere *v.* Dickens, 35 N. West. Rep. 349.) Words having naturally none of their own, carry that signification to the hearer that he is used to put upon them, whatever be the sense of him that uses them. (Locke, Conduct of the Understanding, § 35.) Hobbes terminates one of his chapters with the conclusion that the interpretation of language is with him to whom it is addressed, and Shakespeare says: "A jest's prosperity lies in the ear of him who hears it."

The question in an action for words is not what the party using them considered their meaning by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he uttered them. (Read *v.* Ambridge, 6 C. & P. 308.) In words, as in all other symbols of the mind, it is the mind itself which is to be sought for. (St. Augustine.) "Was the statement reasonably calculated to produce the result which it did? . . . . A cause is not the less proximate because the [publisher] may not have calculated its effect. The injury does not depend upon the intention of the person making the statement. In inquiring whether a certain statement by one person has brought about a certain action on the part of another, you must examine the circumstances and condition of mind of the person to whom the statement was made and not of the person who made it." (Fry, L. J., Seton *v.* Lafone, 57 L. T. R. N. S. 547; 25 The Reporter, 32.)

The question is, how would ordinary men naturally understand the language. (Stroebel *v.* Wheney, 17 The Reporter, 595 [Minn. Jan. 1884]; and see Cochran *v.* Melendy, 17 The Reporter, 542 [Wis. Jan. 1884]; Weil *v.* Schmidt, 28 Wis. 139.)

"The effect of the words used, and not the meaning of the party in uttering them, is the test of their being actionable or not." That is, first ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them. (Hankinson *v.* Bilby, 16 M.

§ 140. Where the language is *ambiguous*, in that case the manner in which it was or might be understood by those to whom it was published, is material, and will control in determining the meaning;[1] but where the language is *unambiguous*, it is to be construed in its ordinary sense, and without reference to how those to whom it was published understood it, or what was intended by the publisher.[2] (§ 384.)

& W. 442.) "The secret intent of the publisher is immaterial." (*Id.*) The injury caused by slander depends on the effect of the words on the hearers. (Hawks *v.* Patton, 18 Ga. 52.)

The speaker "is accountable for the import of the words as they will naturally be understood by the hearer." (Dorland *v.* Patterson, 23 Wend. 424; citing Harrison *v.* Thornborough, 10 Mod. 196; Gidney *v.* Johnson, 11 Johns. 59.) "It was not enough that the defendant could point the slander in his own mind, so long as it appears to have been pointless in the minds of the hearers." (*Id.*) It is the sense in which the hearers understood the words on which the jury are to pronounce. (Demarest *v.* Haring, 6 Cow. 76; Kennedy *v.* Gifford, 19 Wend. 296; Hagan *v.* Hendry, 18 Md. 177.) A defendant in an action for slander is accountable for the import of his words, as they will naturally be understood by the hearer, and explanatory circumstances known to both speaker and hearer are to be taken into account as a part of the words. (De Moss *v.* Haycock, 15 Iowa [7 With.], 149.) "Language shall be construed and understood in the sense in which the writer or speaker intended it." (Commonwealth *v.* Kneeland, 20 Pick. 206; Kerr *v.* Force, 3 Cranch Cir. Ct. 8.) If the words impute a crime, it is not necessary to allege an *intention* to charge such crime. (Galloway *v.* Courtney, 10 Rich. Law, 414.)

"Nor by the term *meaning* are we to understand what the defendant intended to express; for he may have designedly written that which, in its literal sense, should be imperfect. But we are to understand the meaning which he intended others should believe him to have—the sense in which he designed his production should be received by others." (George on Libel, 36; see *post*, § 281.)

[1] Charges of unchaste conduct are seldom made in plain terms, and in such cases it became necessary to prove what the person who heard or read the words understood was the meaning of the publisher. (Branstetter *v.* Dorrough, 81 Ind. 527; Binford *v.* Young, 16 N. East. Rep. 142; Knapp *v.* Fuller, 55 Vt. 311; 29 Alb. L. J. 140; Bourke *v.* Warren, 2 C. & P. 307; see *post*, § 144, subd. *l.*)

[2] A man is to some extent responsible for the hearing of the bystanders, if he uses language which imputes crime, with an explanation; if the bystanders did not hear the explanation, he is liable to an action. (Maybee *v.* Fisk, 42 Barb. 336; see, however, apparently *contra*, Shecut *v.* M'Dowell, 3 Brevard, 38.) But the understanding of the bystanders cannot be shown to make words actionable *per se*, which, as alleged in the declaration, are not actionable *per se*. (Smith *v.* Gaffard, 33 Ala. 168.) Where the charge was actionable *per se*, and unambiguous, and there were no circumstances to qualify it, it was held error to charge the jury that unless the words were understood by the hearers in a slanderous sense, they must find for the defendant. (Jarnigan *v.* Fleming, 43 Mo. 711.)

"Taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or

§ 141. The construction of language as actionable or not actionable, is sometimes determined by the knowledge or imputed knowledge of the person spoken of. Thus, the words, "that thief, A., hath stolen my goods and delivered them to Bacon," held not to give any right of action to Bacon, it not being alleged he knew the goods were stolen.[1] So of the words, he received goods that were stolen, and will be hanged for them.[2] You have passed counterfeit money.[3] So, to allege that one got his sister with child, or had carnal intercourse with his daughter,

printed, the ordinary sense of those words is to be taken to be the meaning of the speaker." (Daines *v.* Hartley, 3 Ex. 200.) "There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and therefore that it may mean directly the reverse of what it professes to mean. Something may have previously passed which gives a peculiar character and meaning to some expression; and some word which ordinarily is used in one sense may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean." (*Id.*)

"We are to understand words in the same sense as the hearers understood them." (Button *v.* Heyward, 8 Mod. 24.) "In a common sense, according to the vulgar intendment of the bystanders." (Somers *v.* House, Holt, 39; *ante*, § 135; Hankinson *v.* Bilby, 16 M. & W. 442.) Language imputing an indictable offense is actionable or not, according to the sense in which *it may fairly be understood* by those who hear or read it, and who are *not* acquainted with the matter to which it relates, or which may render it a privileged communication. (*Id.*) To accept the understanding of the words by the hearer or reader as their true meaning "would be to make the defendant's liability depend, not on his own malicious intent and purpose, in using the language, which might be quite innocent and free from blame, but upon the misconception or morbid imagination of the person in whose hearing they were spoken." (Heard on Libel, § 268, citing Snell *v.* Snow, 13 Metc. 278; Van Vechten *v.* Hopkins, 5 Johns. 211; Gibson *v.* Williams, 4 Wend. 320; Allensworth *v.* Coleman, 5 Dana, 315.) The judgment of the witness is not to be substituted for the judgment of the jury. (Heard on Libel, § 269; Cresinger *v.* Reed, 25 Mich. 450.) "Words are to be taken in that sense that is most natural and obvious, and in which those to whom they are spoken will be sure to understand them." (Heard on Libel, § 163.) Where a certain meaning is alleged, plaintiff may call a witness to show that he (witness) so understood the words. (De Armond *v.* Armstrong, 37 Ind. 35.) See *post*, § 384.

[1] Bacon's Case, Dal. 41, pl. 21.

[2] Ratcliff *v.* Long, Palm. 67. In Miller *v.* Miller, 8 Johns. 58: *Held*, that where the offense charged was concealing stolen goods, it was not necessary to allege that the plaintiff knew the goods were stolen. (See notes to § 173, *post*.) "It would be strange to say, and more to give out as the law of the land, that a man should be allowed to defame in one sense and defend himself in another." (Van Vechten *v.* Hopkins, 5 Johns. 211.)

[3] Pike *v.* Van Wormer, 6 How. Pr. R. 99; Church *v.* Bridgman, 6 Mo. 190.

does not impute incest without an allegation that the plaintiff was guilty of the act charged with a knowledge of the relationship.[1] Without an allegation of knowledge it was held not actionable to charge, "He hath gotten much wealth by trading with pirates,"[2] or, "He was confederate with Campion the Jesuit,"[3] or, "He poisoned Smith,"[4] or, "He is a maintainer of thieves,"[5] or, "He offered or was about to offer for sale unwholesome meal."[6]

§ 142. It is customary to concede (1) that *formerly* courts construed language in *mitiori sensu*, and (2) that the practice of so construing language has been abandoned.[7] These propositions require some qualification.

[1] Lumpkins *v.* Justice, 1 Ind. 557; Griggs *v.* Vickroy, 12 Ind. 549.

[2] Crook *v.* Averin, Godb. 252; 2 Bulst. 216.

[3] Brown *v.* Lisle, Cro. Eliz. 251.

[4] Jacob *v.* Miles, Vin. Abr. Act. for Words, E, *b;* and see Marsh *v.* Davison, 9 Paige, 580, and *post*, § 144, subd. *x*.

[5] Ball *v.* Bridges, Cro. Eliz. 746; and see Tabbe *v.* Matthew, 1 Bulst. 109.

[6] Hemmenway *v.* Woods, 1 Pick. (18 Mass.) 524. See note 2, page 125, *ante*.

[7] Where words are ambiguous, so that they may be expounded in good or ill part, no action lies, for they shall be expounded in the best sense. (Anon. Cro. Eliz. 672.) "The law strains not to hurt, but to heal." (Coote *v.* Gilbert, Hob. 77 *b*.) And "where words are indifferent, and are equally liable to two distinct interpretations, we ought to construe them in *mitiori sensu*, but we will never make any exposition against the plain, natural import of the words." (Pratt, Ch. J., Button *v.* Heyward, 8 Mod. 24; and see Naber *v.* Miecock, Skin. 183.) Words are not to be taken in a milder sense than they have in common acceptation. (Beers *v.* Strong, Kirby, 12.) The maxim for expounding words in *mitiori sensu* has for a great while been exploded. (Fortescue, J., Button *v.* Heyward, 8 Mod. 24; Roberts *v.* Camden, 9 East, 93; and see Wakley *v.* Healey, 7 Com. B. 591; Ogden *v.* Riley, 2 Green, 186; Duncan *v.* Brown, 15 B. Monr. 186; Fallenstein *v.* Boothe, 13 Mo. R. 427; Demarest *v.* Haring, 6 Cow. 76; Pike *v.* Van Wormer, 6 How. Pr. R. 99; Backus *v.* Richardson, 5 Johns. 476.) "The earlier English judges discouraged the actions of slander by all sorts of evasions." (Gibson, J., Bash *v.* Sommer, 20 Penn. St. R. 159; and see Harrison *v.* Thornborough, 10 Mod. 196.) "We will not give more favor unto actions on the case for words than of necessity we ought to do, where the words are not apparently scandalous, these actions being now too frequent." (Coke, Ch. J., Crofts *v.* Brown, 3 Bulst. 167.) In Allsop *v.* Allsop (5 Hurl. & N. 534) the court says actions for slander are not to be encouraged; and see Bennett *v.* Williamson, 4 Sandf. 67, where it is said: "The law of libel ought to be considered and is in its spirit a benevolent and salutary provision for the peace and security of the community, but it cannot redress every injury sustained by a breach of morals or of good manners. We may not approve of the taste of publications such as is set forth in the declaration in the cases. We may lament the existence of a disposition to make private character too much the subject of comment and abuse, without having it in our power

Alleged defamatory matter comes before the court for construction in the form of a pleading, and then, of course, is governed by the rules for construing pleadings, and among these rules, that by which the pleader is supposed to have stated his case in the manner most favorable to himself.[1]

through the instrumentality of the law to arrest the evil;" and in Dolloway *v.* Turrill, 26 Wend. 397, the action for libel is designated as a sordid action. "Such actions [slander, libel and malicious prosecution] generally involve more of passion than of principle or actual damage." By the Court, Wavle *v.* Wavle, 16 Hun, 126. "Generally speaking, a civil action for libel is a dangerous experiment. In a large majority of cases the plaintiff, after advertising to all the world that he is willing to sell his reputation for money, discovers that his reputation won't bring enough, after all, to more than pay his counsel fees." Merrill, Newspaper Libel, 97. "Although slanders are to be suppressed, yet the judges had resolved that actions for scandals should not be maintained by any strained construction." (Wray, Ch. J., Stanhope *v.* Blith, 4 Co. 15.) Ch. J. Holt said that, whenever words tended to take away a man's reputation, he would encourage actions for them, because so doing would contribute to the preservation of the peace; and he repeated a story attributed to Justice Twisden, of a man who, failing in his action for words, said, if he thought he should not have recovered damages, he would have cut the defendant's throat. (Baker *v.* Pierce, 2 Ld. Raym 959; 6 Mod. 24; Cas. temp. Holt, 654; and see *ante*, note, p. 39. One who couches his slander in ambiguous terms, in the hope of blasting the reputation of his neighbor without incurring any legal responsibility, cannot claim an indulgent construction of his words. (Gibson *v.* Williams, 4 Wend. 320.)

Starkie (1 Starkie on Libel, 47) refers to the following cases as specimens of the doctrine of *benignior sensus:* "Thou art as arrant a thief as any in England, for thou hast broke up J. S.'s chest, and taken away £40." After verdict for plaintiff, held not actionable. (Foster *v.* Browning, Cro. Jac. 688.) "Thou art a lewd fellow; thou didst set upon me by the highway, and take my purse from me, and I will be sworn to it." After judgment for the plaintiff, held on error not actionable. (Holland *v.* Stoner, Cro. Jac. 315.) "Thou art a thievish rogue, and hast stolen bars of iron out of other men's windows;" not actionable. (Powell *v.* Hutchins, Cro. Jac. 204.) "J. D. was robbed of £40, and Alice Bagg [plaintiff] and T. S. had it, and for that they will be hanged;" after judgment for plaintiff, held not actionable. (King *v.* Bagg, Cro. Jac. 351.) And so of "Thou dost lead a life in manner of a rogue; I doubt not but to see thee hanged for striking Mr. Sydman's man, who was murdered." (Barrons *v.* Ball, Cro. Jac. 331.)

[1] The law will not assume in favor of a party anything he has not averred (Cruger *v.* Hudson River R. R. Co., 12 N. Y. 201), or that the pleading is less strong than the facts warrant. (*Id.*) A pleading is to be construed in its popular sense (Woodbury *v.* Sackrider, 2 Abb. Pr. R. 405; Mann *v.* Morewood, 5 Sandf. 557); according to what it says, and not what the pleader intended. (Gould v. Glass, 19 Barb. 185; and see Allen *v.* Patterson, 7 N. Y. 480; Sheddon *v* Patrick, 1 Macq. H. L. Cas. 535.) The court will not, in support of a pleading, infer a criminal intention where the pleader has not ventured directly to aver its existence. (Bartholomew *v.* Bentley, 15 Ohio, 670.) "It is a clear principle that the language of an indictment [a pleading] must be construed by the rules of pleading, and not by the common interpretation on ordinary language, for nothing indeed differs more widely in construction than the

We are of the opinion that an examination of the decisions will disclose the fact that what are regarded as constructions in *mitiori sensu* are usually a more or less rigorous application of this rule of pleading. The words admitting of two constructions, the one actionable and the other not actionable, where the pleader failed to point the language to the actionable meaning, courts have refused to put the actionable meaning on the language, supposing that, if the language had such a meaning, the pleader would have pointed it out. The rule requiring certainty in the allegations of a pleading was, no doubt, carried to excess,[1] but we take it to have always been and to be still the rule, that where a party makes a charge of having been injured by language, it is for him to show that the words have a defamatory sense,[2] and that, where the language is

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same matter when viewed by the rules of pleading and when construed by the language of ordinary life." (Per Earle, J., in Reg. *v.* Thompson, 16 Q. B. 832, 846; 4 Eng. Law & Eq. R. 287, 292; and see Blickenstaff *v.* Perrin, 27 Ind. 527; Lukehart *v.* Byerley, 53 Penn. St. Rep. 418.)

[1] Action for the words, *Home dit:* Sir Th. Holt hath taken a cleaver and stricken his cook upon the head, so that one side of the head fell upon one shoulder and the other upon the other shoulder, et [the declaration] ne averr que le cook fuit mort, et pur ceo fuit adjudge nemy bon. For it not being averred that the cook was killed, the striking was a trespass only. (Holt *v.* Astgrigg, Cro. Jac. 184; Rolle R. 286.) In England such a striking is by statute (7 Wm. IV & 1 Vict. ch. 85, § 4) a felony.

[2] Tindal, Ch. J., Edsall *v.* Russell, 5 Scott's N. R. 801; 2 Dowl. N. S. 614; 4 M. & G. 1090; 12 Law Jour. Rep. N. S. C. P. 4; *note* 2, p. 118, *ante*. "Either the words themselves must be such as can only be understood in a criminal sense, or it must be shown by the introductory allegations that they have that meaning, otherwise they are not actionable." (Holt *v.* Scholefield, 6 T. R. 691.) Words, to be actionable, should be unequivocally so. (Harrison *v.* Stratton, 4 Esp. Cas. 218.) Where there is no *introductory averment*, plaintiff must be held to allege that the words were used in their natural and ordinary signification (Edgerly *v.* Swain, 32 New Hamp. 478); and they will be so construed, and not in *mitiori sensu*. (Chaddock *v.* Briggs, 13 Mass. 248; Bloss *v.* Tobey, 2 Pick. 320.) The rule is that the language employed is to be given its ordinary import and meaning, unless an explanation accompanies the words which gives them a different meaning, or unless all the hearers understand that they refer to a transaction which cannot constitute the crime which the words imply. (Hayes *v.* Ball, 72 N.Y. 418.) Where the words have two meanings, one of them harmless and the other injurious, the innuendo may properly point out the injurious meaning. (Joralemon *v.* Pomeroy, 22 N. J. 271; Griffith *v.* Lewis, 8 Q. B. 841; 7 Law Times, 177; Gosling *v.* Morgan, 32 Penn. St. Rep. 273.)

equally as susceptible of a harmless as of an injurious meaning, it is the duty of the pleader, and not of the court, to point out the injurious meaning; and if he fails to do this, the court will not put upon the language the injurious meaning. Although there may be no rule by which courts are required to put on ambiguous language its non-actionable sense, certainly there is no rule by which courts are required to put on ambiguous language the actionable sense. The rule is that the natural meaning is to be taken,[1] and if in that view the language will bear a non-actionable meaning, equally as well as an actionable one, courts will adopt the non-actionable construction. Where the meaning is doubtful, the pleader may, by an innuendo, point the language to the sense in which he wishes it to be understood. Where the alleged defamatory matter was that A., a prostitute, was under the patronage or protection of the plaintiff, there was no innuendo pointing an injurious meaning, yet the language was held actionable.[2] "Where words in their ordinary sense do not bear a de-

[1] "Words" are not to be taken in the more lenient or the more severe sense, but in the sense which fairly belong to them, and which they were intended to convey." (Ld. Ellenborough, Rex *v.* Lambert; 2 Camp. N. P. Cas. 398.) See note 2, p. 117, *ante*. The court will not, in support of a pleading, infer a criminal intention, when the pleader has not ventured directly to aver its existence. Bartholomew v. Bentley, 15 Ohio, 670.)

[2] More *v.* Bennett, 48 N. Y. 472; rev'g S. C. 33 How. Pr. R. 180; 48 Barb. 229; and see Dolloway *v.* Turrill, 26 Wend. 383, where the court, in the absence of an innuendo, construed in a harmless sense a charge of using money for shaving purposes. (Stone *v.* Cooper, 2 Denio, 293.) In Edsall *v.* Russell (5 Scott N. R. 801; 2 Dowl. N. S. 614; 4 Man. & G. 1090) the words were: "He made up the medicines wrong through jealousy, because I would not allow him to use his own judgment." There being no innuendo that the defendant meant to impute that the medicines occasioned any injury, the court refused to put that meaning upon them, and held the words not actionable. And see Forbes *v.* King, 1 Dowl. 672; Kelly *v.* Partington, 5 B. & Adol. 645. The head note to Wesley *v.* Bennett (5 Abb. Pr. R. 498), that, "where the words alleged in a complaint for libel are fairly susceptible of a construction which would render them actionable, the complaint will be sustained upon demurrer, although the words may also be interpreted in a way which would render them innocent," although it may be a correct statement of the law, seems not to be justified by the opinion of the court. The decision was that the alleged libel might "fairly be held to mean" that plaintiff was engaged in the conspiracy mentioned in the charge.

famatory construction, there must be a distinct averment that the words bear a meaning that is actionable."[1] Courts will not strain to find an innocent meaning, nor will the court put a forced construction on words having an innocent meaning. The words, "He was guilty of most abominable conversation and exposure of his person," held not actionable *per se*.[2] Where the allegation was that defendant, speaking of certain spoons belonging to her, said: "I dare say she [the plaintiff] has some of them in her pocket." There being no innuendo, held not actionable, as plaintiff might have the spoons in her pocket innocently.[3] Publishing of plaintiff that he figured prominently in the squatter riots, not explained by innuendo, held not actionable, as it did not follow plaintiff was wrongly or unlawfully engaged in said riots.[4] Where the words were of persons in trade, "Look out sharp to get your bills met by them," the court held that *prima facie* the words were harmless.[5] And the word "blackleg" unexplained was held not actionable.[6] So, there being no proper averment to point the meaning of the words, "he was taken to court on a charge of forgery," were held not actionable, as they might mean plaintiff was taken to court as a witness.[7] Among other reasons which might be urged for requiring the plaintiff to allege in what sense he considers and desires the court and jury to consider the language was used is this, that, unless he does so, he deprives the defendant of the right to traverse the sense which the plaintiff imputes to the language of which he complains. [§ 3381.] An instance of the advantage to a defendant of this right

[1] Blackburn, J., Cox *v.* Cooper, 9 Law Times Rep. 329.

[2] Torbitt *v.* Clare, 9 Irish Law Rep. 89; Ward *v.* Reynolds, 1 Dav. & Mer. 507.

[3] Martinere *v.* Mackay, 2 Law Reporter, 126 (London, 1822), in Appendix, *post*.

[4] Clarke *v.* Fitch, 41 Cal. 473.

[5] Daines *v.* Hartley, 3 Ex. 200.

[6] Barnett *v.* Allen, 1 Fos. & F. 125; 3 Hurl. & N. 376.

[7] Harrison *v.* King, 7 Taunt. 431; affi'g 4 Price, 46. A charge that plaintiff *used* his daughter, held to impute *incest*. (Gath *v.* Lubach, 40 N. West. Rep. 681.)

is the case where the plaintiff alleged that defendant had applied to him the term "black sheep," and that the defendant was accustomed to use that term to mean a person of bad reputation, and that the term was so used on the occasion of which the plaintiff complained. The defendant pleaded that he had not so used the term on the occasion in question, and upon demurrer the plea was sustained.[1]

§ 143. Where language may be taken in a double sense, the court, after a verdict, will *usually* construe it in that sense which will support the verdict.[2] If the language

[1] McGregor *v.* Gregory, 11 M. & W. 287; affi'g Clarkson *v.* Lawson, 6 Bing. 587, and see Smith & Carey, 3 Camp. 361.

[2] In Burges *v.* Bracher (8 Mod. 240), it is said that, after verdict, the court will *always* construe the words to support the verdict, and the dictum is repeated by Starkie without qualification. (2 Starkie on Slander, 108.) But such a rule as was pointed out by Best, Ch. J., in Goldstein *v.* Foss (6 B. & Cr. 154; 9 D. & R. 197; 4 Bing. 489; Moo. & P. 402; 2 Y. & Jer. 146), would practically deprive a party of the right to move in arrest of judgment; and see Forbes *v.* King, 1 Dowl. Pr. Cas. 672. In Ceely *v.* Hoskins (Cro. Car. 509), the words were: "Thou art forsworn in a court of record, and that I will prove." It was contended, after verdict for plaintiff, that the action would not lie, because it was not said in what court of record he was forsworn, nor that he was forsworn in giving any evidence to a jury; that it might be intended only that he was forsworn, not judicially, but in ordinary discourse in some court of record: *Held*, the words must be taken as an accusation of perjury. The court adds: To say such an one is a murderer, without saying whom he murdered, or when, an action lies, and it shall not be intended that he was a murderer of hares, unless such foreign intendment be shown or discovered in pleadings. In Baal *v.* Baggerly (Cro. Car. 326), the words were: "Thou hast forged a privy seal and a commission! why dost thou not break open thy commission?" After verdict for plaintiff it was contended that the words were not actionable, but by the court being found guilty, the words are to be intended according to the vulgar interpretation, that the king's privy seal was meant, the counterfeiting whereof is treason. In Somers *v.* House (Holt, 39), the words were: "You are a rogue, and broke open a house at Oxford; and your grandfather was forced to bring over £30 to mend the breach." After verdict for plaintiff, it was urged in arrest of judgment that the word rogue was not actionable, that *breaking open* a house was but a trespass, and *mending the breach* might be *repairing*; but the court held the contrary, for, taking all the words together, one who heard them could not but understand a felonious breaking; the court would take the words in a common sense, according to the vulgar intendment of the bystanders. In Baker *v.* Pierce (2 Ld. Raym. 959; 6 Mod. 234; Holt, 654), the words were: "Baker stole my boxwood, and I will prove it." After verdict for plaintiff, it was urged in arrest of judgment, that the words mean wood growing, of which only a trespass could be committed; that to say you are a thief, and have stolen my timber, or my apples, or my hops, is not actionable, for it imports

admits of a harmless as well as an injurious meaning, which is the meaning to be attached to it will be resolved by the verdict.[1] It is not sufficient to show by argument that the language will admit of some other meaning than that which obviously the jury have attached to it,[2] and therefore, after verdict for plaintiff, language which admits of an innocent and an injurious meaning, will be construed to have its injurious meaning.[3] After verdict all averments on the side of the successful party, which were involved in the issue tried, will be taken to have been duly proved, unless the

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only a trespass; but the court ordered judgment for the plaintiff, and denied the authority of the case of Mason *v.* Thompson (Hutt. 38), in which the words, "I charge thee with felony in taking forth from J. D.'s pocket, and I will prove it," were held not actionable. In 3 Salk. 325; 2 Vent. 172; 2 Lev. 51; 2 Sir T. Jo. 235, the words were: "He is a clipper and coiner." After verdict for plaintiff, it was moved in arrest of judgment, that it was not a charge of clipping and coining money, but held a clipping and coining of money must be intended. Where the words were spoken by a married woman, charging the theft of *her* goods, to support a verdict, it was held that she meant a theft of her goods before marriage. (Powell *v.* Plunket, Cro. Car. 52.)

[1] Ford *v.* Primrose, 5 D. & Ry. 287; Giddings *v.* Merk. 4 Ga. 364; O'Connor *v.* Lloyd, 2 Hudson & Br. 626; Chapman *v.* Smith, 13 Johns 78; Sherwood *v.* Chace, 11 Wend. 38.

[2] Woolnoth *v.* Meadows, 5 East, 463; Roberts *v.* Camden, 9 East, 93.

[3] "Words or signs will, after a verdict for the plaintiff, be considered by the courts to have been used in their worst sense." (1 Starkie on Slander, 60; repeated, Heard on Libel, § 173, citing Southee *v.* Denny, 1 Ex. 196; Slowman *v.* Dutton, 10 Bing. 402; 4 M. & Sc. 174; Wakley *v.* Healey, 7 Com. B. 591; Tomlinson *v.* Brittlebank, 4 B. & Adol. 630; 1 Nev. & M. 455; Francis *v.* Roose, 3 M. & W. 191; Hughes *v.* Rees, 4 M. & W. 204; Rowcliffe *v.* Edmonds, 7 M. & W. 12; Digby *v.* Thompson, 4 B. & Adol. 821; 1 Nev. & M. 485; Daines *v.* Hartley, 3 Ex. 200; Read *v.* Ambridge, 6 C. & P. 308; Shipley *v.* Todhunter, 7 C. & P. 680; Chaddock *v.* Briggs, 13 Mass. 248; Goodrich *v.* Davis, 11 Metc. 473; Brown *v.* Lamberton, 2 Binn. 35; Bloom *v.* Bloom, 5 Serg. & R. 391; Cornelius *v.* Van Slyck, 21 Wend. 70; Butterfield *v.* Buffum, 9 New Hamp. 156; Hamilton *v.* Smith, 2 Dev. & B. [Law], 274; Hancock *v.* Stephens, 11 Humph. 509; Goodrich *v.* Woolcott, 3 Cow. 231; Walton *v.* Singleton, 7 Serg. & R. 451; and see Beers *v.* Strong, Kirby, 12; Wilson *v.* Cottman, 2 Central Reporter, 868; Ct. of App. M'd, N. Cent. R. R. Co. *v.* Canton, 24 Md. 492.)

One of the reports commenced, "Willful and corrupt perjury;" held that, after verdict for the defendant, this must be taken as a description of the nature of the charge, not as an imputation, by the publisher, of the perjury in fact. (Lewis *v.* Levy, 1 Ellis, B. & E. 537.)

Publishing in writing that the plaintiff had realized the fable of the frozen snake; after verdict for plaintiff, the court refused to arrest the judgment, as the jury might have understood the words "frozen snake" to impute a charge of ingratitude to friends, although not so explained by innuendo. (Hoare *v.* Silverlock, 12 Ad. & Ell. N. S. 624.)

contrary appear upon the record,[1] and thus, after verdict for plaintiff, if the language published may, in its ordinary acceptation and without the aid of extrinsic circumstances, be reasonably understood as having an actionable meaning, judgment will not be arrested upon the ground that the inducement and innuendoes do not sufficiently apply the language to the plaintiff, nor because the innuendoes, in so far as they apply the language to the plaintiff, are unwarranted.[2] If the innuendoes are unwarranted in any other respect, it is a ground for arresting the judgment.[3]

§ 144. We here give some additional illustrations of the manner in which the courts have construed certain language; many more illustrations will be found in the next succeeding chapter:

a. Adultery.—A charge of violating the seventh commandment, held not to import a charge of adultery.[4]

b. And—For.—A distinction has been taken between saying, Thou art a thief, *for* thou hast stolen such a

[1] Gates *v.* Bowker, 18 Vt. (3 Washb.) 23; Cass *v.* Anderson, 33 Vt. (4 Shaw), 182; Hoyle *v.* Young, 1 Wash. 150; Ramsey v. Elms, 3 Jur. 1189. But nothing more will be presumed after verdict than is necessary to support the allegations. (Sweetapple *v.* Jesse, 2 Nev. & M. 36; 5 B. & Adol. 27.) Where the words taken by themselves do not necessarily import a charge of crime, yet where it is alleged in the innuendo that the defendant meant by the words that the act was maliciously done, they will be taken, after verdict, to have been intended to import such a charge. (Tuttle v. Bishop, 30 Conn. 80; and see Kennedy *v.* Gifford, 19 Wend. 256; Beers *v.* Strong, Kirby, 12; Ramsey *v.* Elms, 3 Jurist. 1189.) What defects are cured by Verdict, see Rushton *v.* Aspinall, Doug. 679; and 1 Smith's Lead. Cas.

[2] Wakley *v.* Healey, 18 Law Jour. C. P. 241; 7 C. B. 591.

[3] §§ 335 to 344, *post.*

[4] Farnsworth *v.* Storrs, 5 Cush. 412. A count in slander alleged that defendant accused plaintiff of adultery, by words spoken of her, as follows: I [defendant] was speaking to a certain lady about Mrs. Y., or Mrs. Y.'s case, meaning the accusation that Mrs. Y. [plaintiff] had a loathsome disease, and had communicated it to a married man named C. W.: held, the count did not set forth circumstances showing an accusation by defendant that plaintiff had committed adultery, and the want of such averment was not cured by innuendo, and that the count was bad. (York *v.* Johnson, 116 Mass. 482.) "I know all about that case, while she was out there claiming to be the wife of Funk, she was back here claiming to be my wife." Held not actionable, *per se.* (Funk *v.* Beverly [Ind.], 13 Mo. Est. Rep. 573.) "She has been lying on the lounge with a male boarder" not actionable. (Koch *v.* Heideman, 16 Bradw. [Ill.] 478.)

thing, as a tree, which could not be a felony, and the saying, Thou art a thief, *and* hast stolen such a thing, since in the former case the subsequent words show the reason for calling the plaintiff a thief, and that no felonious imputation was meant; but in the latter the action lies for calling him a thief, and the addition, Thou hast stolen, is another distinct sentence by itself, and not the reason for the former speech, nor any diminution thereof.[1] To say one has been in jail *for* stealing, in some cases held not to imply that the party stole, and in others that it did. In the latter class of cases, it was said he could not be imprisoned *for* stealing if he did not steal.[2]

c. Arson.—The words "Thou set fire to those buildings, and thou wilt never be easy till thou hast told of it," do not impute arson.[3] So of the words, "he fired his house;[4] he burnt my barn;[5] he set the store on fire, and none but him;[6] T. burned the mill himself;[7] but the words, He set fire to and burned my factory, were construed to mean a willful burning,[8] and the words, "Public opinion says you was the author of it [firing a stable], and what public opinion says I believe to be true," held to amount to a charge of

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[1] Cro. Jac. 114; Bull. N. P. 5; Hob. 77, 106; Cro. Eliz. 857; Brownl. 2; Godb. 241; Hard. 7; All. 31; Sty. 66; 1 Starkie on Slander, 99. This distinction was referred to, and its correctness questioned by, Holt, Ch. J., Baker *v.* Pierce, 6 Mod. 23, where it is said *and* and *for* have the same meaning; and see Lewis *v.* Acton, Yelv. 34.

[2] Vin. Abr. Act. for Words, P, *a*, 2.

[3] Rigby *v.* Heron, 1 Jur. 558. "We have recently been defending a suit brought against this association by K., who lost his stock of goods by fire last October. There were circumstances which satisfied the directors that the fire was not accidental, consequently we did not feel it right to assess this association to pay what we had reason to believe a fraudulent loss." Held to amount to a charge of arson. (Montgomery *v.* Knox. 3 So. Rep. 211 [Fla.].) Charge of setting fire to building of another actionable *per se*. (Fleming *v.* Albeck, 67 Cal. 227.)

[4] Anon. 11 Mod. 220.

[5] Barham *v.* Nethersall, Yelv. 21.

[6] McNab *v.* McGrath, 5 Up. Can. Q. B. Rep. O. S. 516.

[7] Tebbetts *v.* Goding, 9 Gray (Mass.), 254.

[8] Tuttle *v.* Bishop, 30 Conn. 80.

arson;[1] and so of the words, "I have every reason to believe he burnt the barn, and I believe he burnt the barn."[2] "You set your house on fire; you are a bad character," thereby meaning that plaintiff had been guilty of willfully setting his house on fire, and was a person of bad character, and had subjected himself to the penalties of the law for setting his house on fire, there being no *colloquium* that the words were concerning a house insured by the plaintiff against fire, nor of a house situated in or contiguous to a populous neighborhood, held on motion in arrest of judgment after a verdict for plaintiff, that the words were not actionable.[3]

d. Bawdy-house.—Your house is no better than a bawdy-house, is equivalent to charging that the party kept a bawdy-house;[4] but public house, or house of ill-fame, cannot be so construed.[5] Whore-house is equivalent to a bawdy-house, or house of ill-fame.[6]

e. Bigamy.—The words "he was married to a woman [naming her], and kept her till he got sick of her, and then sent her away, having all this time two wives," amount to a charge of bigamy.[7]

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[1] Gage *v.* Shelton, 3 Rich. 242. It is the general opinion of the people in J.'s [plaintiff's] neighborhood that he burnt C.'s gin-house, held actionable. (Waters *v.* Jones, 3 Port. 442.)

[2] Logan *v.* Steele. 1 Bibb. 593; I believe A. [plaintiff] burnt the camp-ground, held actionable. (Giddens *v.* Merk, 4 Ga. 364.) My watch was stolen in Polly Miller's bar; I have reason to believe that Tina M. [plaintiff] took it, and Polly Miller, her mother, concealed it, actionable. (Miller *v.* Miller, 8 Johns. 60.)

[3] Jackson *v.* Greer, 1 Law Reporter, 5 (London, 1821). See Montgomery *v.* Knox, 3 So. Rep. 211.

[4] Huckle *v.* Reynolds, 7 C. B. N. S. 114.

[5] Dodge *v.* Lacey, 2 Carter (Ind.), 212. House of ill-fame, or bad house, means the house is one of bad reputation, not that it is a bawdy-house, unless there is an inducement that defendant was in the habit of using the words "house of ill-fame," to convey the idea of "bawdy-house." (*Id.*; Peterson *v.* Sentman, 37 Md. 140.)

[6] Wright *v.* Paige, 36 Barb. 438; affi'd, Ct. of Appeals, 3 Trans. App. 134.

[7] Parker v. Meader, 32 Vt. (3 Shaw), 300.

f. Blackleg.—The term blackleg does not necessarily mean a cheating gambler.[1]

g. Clipper.—Where the words were, Thou art a clipper, *and* shalt be hanged for it—it was held that the word clipper, taken in connection with the words which followed it, meant a clipping of money—a felony.[2]

h. Conspiracy.—A libel which was alleged to be concerning a false charge of felony, made through feelings of religious bigotry, by the plaintiff against one D. S., went on to allege that plaintiff was aided in making said charge by one C. R., who was stated to "have been for some time back employing every means to win the confidence of this young gentleman, their intended victim (meaning thereby that plaintiff and said C. R. had been contriving some plan to assail the character of said D. S.), as taking him on country visits, and inviting him to the continent, with the hope, it is alleged, of getting him altogether to themselves, and destroying his prospects the more easily, by some foul charge, which he might not find means of contradicting, there being no one else of the company. They had met with a direct refusal, it seems, to their invitation to the continent, and therefore, rather prematurely, opened their present plot (meaning said charge of felony). Affidavits are, we understand, shortly to be laid before the law offices of the crown, charging the above facts, together with certain conversations between the pair of Romanists, who have trained this ingenious manœuvre (meaning the charge of felony aforesaid)." Held that the language did not amount to a charge of conspiracy.[3]

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[1] Barnett *v.* Allen, 3 Hurl. & N. 376; 1 Fos. & F. 125.

[2] Walter *v.* Beaver, 3 Lev. 166.

[3] O'Connell *v.* Mansfield, 9 Irish Law R. 179.

i. Convicted Felon.—Plaintiff having been convicted of selling liquor in violation of law, was termed in a printed circular a "*convicted felon*;" held, that if these terms, taken in connection with the context and the evidence, were understood to mean only an offender against the license law, they were no cause of action.[1]

ii. Embezzling.—"H. B. McC. (plaintiff, a railroad conductor), has been discharged for failing to ring up all fares collected." Held, not in its ordinary sense to imply that plaintiff had been discharged for embezzling fares, but only for failing to "ring them up," and there being no evidence that the meaning of the words in the particular instance were other than their ordinary meaning, the defendant was entitled to judgment.[2] To publish of the late manager of a factory, among other things, that he became very neglectful of his duty, the factory was badly managed besides which reports were in circulation that all the materials of the company sent to the factory were not used in the construction of their pianos; held, to amount to a charge of embezzlement.[3]

j. Embracery.—Saying that A., on a certain trial, handed papers to one of the jury, and that he ran away, or the judge would have put him in prison for it—or

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[1] Perry *v.* Man, 1 Rhode Island, 263. *Convicted scoundrel*, with an innuendo meaning plaintiff had been guilty of a crime and had been convicted of such crime, was on demurrer held actionable. (Wilson *v.* Lawson, Melbourne Argus Rep. 30 Nov. 1857; see Leyman *v.* Latimer, L. R. 3 Ex. Div. 15.)

[2] Pittsburgh R'y Co. *v.* McCurdy, 35 Alb. L. R. 202; 6 Cent. Rep. 719; see in note to § 384, *post*.

[3] Manner *v.* Simpson, 13 Daly, 156, and see Woddrop *v.* Thacher, 11 Atl. Rep. 621 (Pa.), charging jury as to what amounts to. (Chaplin *v.* Lee, 25 No. West. Rep. 609 [Neb.].) Stating that plaintiff had "disappeared with some of his employer's funds, and the police have been notified," may import embezzlement. (Mallory *v.* Pioneer Press Co. 26 No. West. Rep. 904, [Minn.].)

that he handed papers to the jury to influence or bribe them—imputes embracery, and is actionable *per se*.[1]

k. Forgery.—The term forgery does not necessarily mean a felonious forgery,[2] as to say one forged words and sentiments for Silas Wright;[3] and to deny having signed a note, or authorized his name being indorsed, does not import a charge of forgery;[4] nor does a charge, if you have any letters from them, you forged them;[5] or, I never put my name on the back of the note, but he must have done it.[6] A charge of altering books may impute forgery.[7] Exhibiting a note and saying, "Do you think it is G.'s handwriting?" may import a charge of forgery;[8] and so the words, "He altered the note to get better security, to bind me to pay it."[9] The words, I would give five dollars if I could write as well as that—I never signed the note,[10] do not necessarily impute forgery. But a letter charging plaintiff with having subscribed defendant's name to a receipt without authority, and to defraud him out of the money, and adding, It is not my purpose to call hard names—the statute fixes the name and punishment—imputes forgery.[11]

l. Fornication.—To allege that a woman is not a decent woman,[12] or a bad character, a loose character,[13] or has

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[1] Gibbs *v.* Dewey, 5 Cow. 503.
[2] Alexander *v.* Alexander, 9 Wend. 141. See § 167, *post*.
[3] Cramer *v.* Noonan, 4 Wis. 231.
[4] Andrews *v.* Woodmansee, 15 Wend. 232.
[5] Mills *v.* Taylor, 3 Bibb, 469.
[6] Atkinson *v.* Scammon, 2 Fost. 40.
[7] Gay *v.* Homer, 14 Pick. (30 Mass.) 535.
[8] Gorham *v.* Ives, 2 Wend. 534.
[9] Harmon *v.* Carrington, 8 Wend. 488.
[10] Andrews *v.* Woodmansee, 15 Wend. 232.
[11] Snyder *v.* Andrews, 6 Barb. 43.
[12] Dodge *v.* Lacey, 2 Carter [Ind.], 212.
[13] Vanderlip *v.* Roe, 23 Penn. St. Rep. (11 Harris), 82. Charging an unmarried female with having had illicit intercourse with a man named is not actionable *per se*. (Pettibone *v.* Simpson, 66 Barb. 492.)

raised a family of children to a negro, does not amount to a charge of fornication;[1] but to say of an unmarried woman, she had a child and buried it in the garden, imputes fornication.[2] To say "Malvina [plaintiff] has been to swear a young one," fairly conveys the idea that the plaintiff had been guilty of fornication.[3] So do, with proper innuendoes, the words, "A. caught them [plaintiff and B.] together in the packing-room."[4] "There is no offense which can be conveyed in so many multiplied forms and figures as that of incontinence. The charge is seldom made, even by the most vulgar and obscene, in broad nd coarse language."[5] See § 172, *post.*

m. Kill—Killed—Killing.—The words kill, killed, and killing, unexplained, have a felonious signification.[6] The words, "I think the business ought to have the most rigid inquiry, for he murdered his first wife, that is, he administered improperly medicines to her for a certain complaint, which was the cause of her death," after verdict for plaintiff, held actionable as imputing a charge of manslaughter.[7]

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[1] Patterson *v.* Edwards, 2 Gilman, 720.

[2] Worth *v.* Butler, 7 Blackf. 251. See § 172, *post.* Scandalous and familiar converse with a woman can only mean illegal connection. (Patterson *v.* Patterson, 15 Law Times, 539.)

[3] Patterson *v.* Wilkinson, 55 Maine, 42, *ante*, p. 129, note 1.

[4] Evans *v.* Tibbins, 2 Phila. 210. A charge that plaintiff had crab-lice upon her and got them from her lover; held to impute fornication. (Stoke *v.* Miller, 3 Cent. Rep. 34 [Pa.], and 5 Atl. Rep. 621.)

[5] Duncan, J., Walton *v.* Singleton, 7 S. & R. 449; Buscher *v.* Scully, 107 Ind. 246.

[6] Carroll *v.* White, 33 Barb. 620; Button *v.* Heyward, 8 Mod. 24 Cooper *v.* Smith, Cro. Jac. 423; Hays *v.* Hays, 1 Humph. (Tenn.) 402; Taylor *v.* Casey, Minor (Ala.), 258; Eckart *v.* Wilson, 10 Serg. & R. 44; Johnson *v.* Robertson, 4 Porter (Ala.), 486; Chandler *v.* Holloway, *Id.* 18; Edsall *v.* Russell, 5 Scott N. R. 801; 2 Dowl. N. S. 614; 4 Man. & G. 1090.

[7] Ford *v.* Primrose, 5 Dowl. & R. 287. See § 168, *post.* "He killed her by his bad conduct, and I think he knows more about her being drowned than anybody else," without any inducement; held not to import a criminal homicide, and not to be actionable. (Thomas *v.* Blasdale, 16 N. East. Rep. 214.) "He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there," without any inducement; held to impute a crime and to be actionable.

n. Knave.—Imports dishonesty.[1]

o. Known.—Stating plaintiff is about to commence an action, but that he will not bring it to trial in a particular county because he is *known* there, amounts to a charge that the plaintiff is in bad repute in that county.[2]

p. Larceny.—The words, A man that would do that would steal, do not impute a larceny;[3] but to say one was whipped for stealing hogs, does.[4] You will steal, imputes a charge of larceny.[5] The words "he is mighty smart after night," and "put him in the dark, and he would get it all," spoken with reference to a dispute which existed between plaintiff and defendant, relative to the division of a certain tan-yard; held not to impute the crime of larceny, and not actionable.[6] I have reason to suppose that many of the flowers of which I have been robbed are growing on your premises, held to amount to a charge of larceny.[7] The words, "my table-cloths are gone, and you know where they are gone. If you will bring them back, I will say nothing about it. My husband has gone down town to get a warrant to search your house and imprison you," impute a crime.[8]

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[1] Harding *v.* Brooks, 5 Pick. 244. See § 173, *post*.

[2] Cooper *v.* Greeley, 1 Denio, 347.

[3] Stees *v.* Kemble, 27 Penn. 112; and see Stolen, p. 149, *post*.

[4] Holley *v.* Burgess, 9 Ala. 728.

[5] Cornelius *v.* Van Slyck, 21 Wend. 70.

[6] Kirksey *v.* Fike, 29 Ala. 206.

[7] Williams *v.* Gardiner, 1 M. & W. 245; and see note 1, p. 126, *ante*.

[8] Hess *v.* Jockley, 25 Iowa, 9. A charge that plaintiff had been accused of horse stealing, had sued his accusers, and defendant had a verdict; held to impute grand larceny. (Johnson *v.* St. Louis Dispatch Co. 65 Mo. 539.) And so of the words "he stole my bull, I can prove it; if he don't settle up I'll put him through and make him pay dear for taking him away." (O'Donnell *v.* Hastings, 26 N. W. Rep. 433 [Iowa].) Publishing that persons employed in a department "have been dismissed for alleged theft of leather belonging to the department," with a comment that "the rascals ought to feel thankful for getting off without more severe punishment," is actionable, as amounting to a charge of theft. (Dwyer *v.* Fireman's Journal Co. 11 Daly, 248.)

q. Liar.—The words, "This is not the first time the idea of falsehood and B. [plaintiff] have been associated in the minds of many honest men," import that B. is a liar.[1]

r. Made away with.—A charge of making away with does not amount to a charge of larceny.[2]

s. Murder.—To say one is *guilty* of the death of another imports a charge of murder. The word *guilty* implies a malicious intent, and can be applied only to something which is universally allowed to be a crime. But to say one was the *cause* of another's death does not import a crime, for a physician may be the cause of a man's death, and very innocently.[3]

t. Packing.—The charge of "packing a jury" imports the corrupt selection of a jury.[4]

u. Perjury.—To publish a direct and positive contradiction of what a witness, at a certain trial, had sworn that A. had said; *held*, not to amount to a charge of perjury.[5] Nor do the words, Thou wert detected of perjury, imply being guilty of perjury.[6] Words

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[1] Brooks *v.* Bemiss, 8 Johns. 356.

[2] The words, "Uncle Daniel must settle for some of my logs he has made away with," do not of themselves amount to a charge of larceny. (Brown *v.* Brown, 2 Shep. 317; Connick *v.* Wilson, 2 Kerr [New Brun.], 496.) A charge of carrying away corn does not impute felony, but trespass. (Stitzell *v.* Reynolds, 59 Penn. 488.) Go home and steal more potatoes from Peggy's field, held actionable, as the potatoes might have been severed from the soil, and the words implied a prior stealing. (Hunter *v.* Hunter, 25 Up. Can. Q. B. 145.)

[3] Peake *v.* Oldham, Cowp. 275; Miller *v.* Buckdon, 2 Bulst. 10. See § 168, *post*. A newspaper publication of the suicide of a man, falsely charging, in effect, that it was caused by the exactions of his wife, and by her fraudulent conduct in taking wages for her son which he had not earned, held actionable *per se*. (Bradley *v.* Cramer, 59 Wis. 309.)

[4] Mix *v.* Woodward, 12 Conn. 262.

[5] Steele *v.* Southwick, 9 Johns. 214: see *post*, note to § 171; Perselly *v.* Bacon, 20 Mo. 330; Kern *v.* Towsley, 51 Barb. 385; Spooner *v.* Keeler, 51 N. Y. 527. Charge of taking false oath not a charge of perjury (Downey *v.* Dillon, 52 Ind. 442; Coombs *v.* Rose, 8 Blackf. 155. See Dean *v.* Miller, 66 Ind. 440.)

[6] Vin. Abr. Actions for Words. P. *a*, 21. The words, "Thou didst take a false oath before Justice Scawen," may mean not a justice of the peace named Scawen, but one named Justice

charging a grand juror with having "forsworn himself by neglecting or refusing to present an offense within his knowledge," do not amount to a charge of perjury, or any indictable offense.[1] To say one is forsworn, was indicted for it, and compounded for it, imputes perjury; for the alleged compounding is equivalent to a confession of the indictment being true.[2] And to say, Thou art forsworn, and I will set thee on the pillory, or I will have his ears cropt, imply perjury.[3] Loss of life was occasioned by the collision of two steamboats. An inquest was afterwards held, and a person named Granger, who was on board of one of the steamboats at the time of the accident, gave his evidence. The defendant, in giving an account of the accident and inquest, stated: "Had requisite means been employed, the lives of the two children might have been saved, in spite of the story of Mr. Granger, who swore through thick and thin, and who, although asleep at the moment of the accident, had yet sufficient time to dress himself and assist his wife:" *held*, that the language did not charge Granger with perjury.[4] The following was published by A.: "Charge 4. Refusing to correct G. C. in his statement as a witness before Esq. B., when I believe he, J. C, knew his, G. C.'s, statement was not true." *Held*, that this writing, when shown by proper averments to have been applied by A. to the testimony of G. C., on the trial of a cause, imputed perjury to G. C., and was actionable.[5]

Scawen. (Gurneth *v.* Derry, 3 Lev. 166; note to § 177, *post;* and Call *v.* Foresman, 5 Watts, 331, in § 321, *post.*)

[1] McAnnally *v.* Williams, 3 Sneed, 26.

[2] Gilberd *v.* Rodd, 3 Bulst. 304.

[3] Williams *v.* Bickerton, Het. 63; Vin. Abr. Actions for Words, F, *a*, 11. "I could prove J. S. perjured, if I would," implies that J. S. committed perjury. (*Id.*)

[4] Reg. *v.* Marshall, 2 Jur. 254; and see note to § 137, *ante.*

[5] Coombs *v.* Rose, 8 Blackf. 155.

v. Pilfering.—The term pilfering imports a crime.[1]

w. Plundered.—The term plundered does not import a felonious taking.[2]

x. Poison.—Saying of a surgeon that he did poison the wound of his patient, may mean that he poisoned the wound to cure it. But if it be charged that he poisoned the wound to get money, that is different.[3]

y. Prostitute.—She is a bad girl, and unworthy to be employed, will not support an innuendo, a prostitute.[4] "If I am not misinformed, she is a prostitute," is the same as saying she is a prostitute.[5]

z. Robbed—Robbing.—The *prima facie* meaning of robbed is to impute a crime, an unlawful taking;[6] but the words, You have robbed me of one shilling tan money, amount only to a charge of embezzlement.[7] Robbing is a word of an uncertain signification.[8] The words, "He robbed the treasury and bought a farm with it," were held not to impute a felony.[9]

a. a. Shaving Purposes.—Shaving, as applied to promissory notes, means buying notes at a discount, beyond the

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[1] Becket *v.* Sterrett, 4 Blackf. 499; *contra*, see Carter *v.* Andrews, 16 Pick. 1.

[2] Carter *v.* Andrews, 16 Pick. 1.

[3] Vin. Abr. Actions for Words, R, *a*, 10, 40.

[4] Snell *v.* Snow, 13 Metc. 278.

[5] Treat *v.* Browning, 4 Conn. 408.

[6] Tomlinson *v.* Brittlebank, 1 Nev. & M. 455; 4 B. & Adol. 630; Slowman *v.* Dutton, 10 Bing. 402; Jones *v.* Chapman, 5 Blackf. 88; Heard on Libel, § 38. Robbed held actionable *per se*. (Hutts *v.* Hutts, 51 Ind. 581.)

[7] Day *v.* Robinson, 1 Ad. & El. 554. The words alleged in the declaration were, "You have robbed me of 1*s.* tan money;" innuendo, that he had wrongfully taken to his own use part of money received as the plaintiff's servant, for and on account of the plaintiff, on the sale of tan, and for which he was accountable; *held*, that the facts being stated in the innuendo without any previous introductory allegation, and showing embezzlement rather than robbery, the count was bad.

[8] Palmer *v.* Edwards, Rep. of Cas. of Prac. in C. P. 160.

[9] Allen *v.* Hillman, 12 Pick. 101. The words, "You did rob the town of St. Cloud; you are a public robber," are not actionable, for the crime of robbery cannot be committed against a town. (McCarty *v.* Barrett, 12 Minn. 494.) See § 170, *post*.

debt and interest, which is neither dishonorable nor discreditable.[1]

b. b. Steal—Stolen.—The natural and obvious meaning of steal is a felonious taking or larceny.[2] The term stolen imputes a larceny.[3] Stealing unexplained, *ex vi termini*, imports felony.[4] Stealing and feloniously stealing are not the same; in common parlance, stealing does not always import felony.[5] If the article alleged to have been stolen is of the kind of which felony can be committed, the term steal or stolen imputes a larceny, otherwise if the article alleged to have been stolen could not be the subject of a felony.[6] Thus it has been held not actionable to say, You stole my wood,[7] or my apples;[8] or a load of hop-poles;[9] or a tree;[10] or a dog;[11] or a bee-tree;[12] or wild bees;[13] or a sable caught in a trap;[14] or marl, earth or furze;[15] because felony cannot be committed of such things. A charge of having stolen boards,[16]

[1] Stone *v.* Cooper, 2 Denio, 293.

[2] Dunnell *v.* Fiske, 11 Metc. 551; O'Donnell *v.* Hastings, 68 Iowa, 271. Steal is not the technical term to describe larceny. (U. S. *v.* Stone, 37 Fed. Rep. 247; U. S. *v.* Jones, 37 Fed. Rep. 111.) See § 170, *post*.

[3] Burbank *v.* Horn, 39 Maine (4 Heath), 233; Coleman *v.* Playsted, 36 Barb. 26; Taylor *v.* Short, 40 Ind. 506; *contra*, Dunnell *v.* Fiske, 11 Metc. 551; St. Martin *v.* Desnoyer, 1 Minn. 156.

[4] Powell, J., Baker *v.* Pierce, 6 Mod. 23; De Witt *v.* Wright, 57 Cal. 576; Rhodes *v.* Naglee, 66 *Id.* 677. The words spoken were, "When he was highway commissioner he stole $1,000 from the town," there being no explanatory circumstances; held to impute a larceny. (Hayes *v.* Ball, 72 N. Y. 418.)

[5] Holt, Ch. J., Baker *v.* Pierce, 6 Mod. 23.

[6] Cock *v.* Weatherby, 5 Sme. & M. 333. See note, p. 124, *ante*.

[7] Meaning standing timber. (Robins *v.* Hildredon, Cro. Jac. 65; Idol *v.* Jones, 2 Dev. 162; Heard on Libel, 37, note 3; *contra*, Phillips *v.* Barber, 7 Wend. 439.)

[8] Clarke *v.* Gilbert, Hob. 331*a*.

[9] Guilderslew *v.* Ward, Cro. Eliz. 225; Dexter *v.* Taber, 12 Johns. 239. He stole my corn; actionable. (Hoag *v.* Cooley, 33 Kans. 387.)

[10] Coote *v.* Gilbert, Hob. 77*b*. See Bryan *v.* Wikes, Cro. Car. 572.

[11] Findlay *v.* Bear, 8 Serg. & R. 571. Charging larceny of a dog is actionable in Kansas. (Harrington *v.* Miles, 11 Kan. 480; and see 2 Alb. Law Jour. 101, and note, 15 Amer. Rep. 356.)

[12] Cock *v.* Weatherby, 5 Sme. & M. 333.

[13] Wallis *v.* Mease, 3 Binn. 546; Gillet *v.* Mason, 7 Johns. 16.

[14] Norton *v.* Ladd, 5 New Hamp. 203.

[15] Ogden *v.* Riley, 2 Green, 186; Clarke *v.* Gilbert, Hob. 331. See Penal Code of N. Y., § 640, subd. 4.

[16] Burbank *v.* Horn, 39 Maine (4 Heath), 233.

or "my boxwood,"[1] held to impute a larceny; and a charge of stealing the property of A., deceased, imports a larceny from the personal representatives of A.[2] He will steal, and I can prove it, is equivalent to saying he had stolen;[3] and to allege, I will venture anything he has stolen the book, is equivalent to a charge of stealing the book.[4] To say, You are as great a rogue as your master, who stole rugs, is not a charge of stealing, without an averment that the master had committed felony.[5] It is not actionable to charge acts which amount only to a trespass, and although the defendant may use the word *steal* or *stole*, yet, if the context shows the word was intended to refer to such acts, and was so understood, no action lies.[6] If you do not give me up the bills I shall give you in charge for stealing them, innuendo, meaning that plaintiff had stolen the bills, held to amount to a charge of stealing and to disclose a cause of action.[7] "I have seen women steal yarn before." These words not actionable with an innuendo, but without a colloquium.[8]

c. c. Suffer.—To *suffer*, held to import suffer death, as where the defendant said, "I will make you *suffer* for a witch," it was held to mean suffer death for a witch.[9]

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[1] After verdict for plaintiff. Baker *v.* Pierce, 6 Mod. 23.

[2] Bash *v.* Sommer, 20 Penn. St. R. 159.

[3] Cornelius *v.* Van Slyck, 21 Wend. 70, and see Bays *v.* Hunt, 60 Iowa, 251.

[4] Nye *v.* Otis, 8 Mass. 122.

[5] Upton *v.* Pinfold, Comyn's R. 268. You are as bad as thy wife when she stole my cushion, not actionable. (Radcliff *v.* Michael, Cro. Jac. 331.) The words, "I expect Murphy will have plenty of bacon to sell, as he has killed some of my hogs," after verdict for plaintiff, were held to amount to a charge of hog-stealing. (Murphy *v.* Antley, 2 Boston Monthly Law Rep. N. S. 520.) R. S. was attainted of felony, and defendant said, You [plaintiff] have done as ill and worse; it will not cost you as much to be quit as it cost him. Court doubted if actionable. (Smith's Case, Cro. Eliz. 31.)

[6] McCaleb *v.* Smith, 22 Iowa, 242; Wing *v.* Wing, 66 Maine, 62. There the charge was plaintiff stole windows from C. D.'s house, and held not actionable as imputing only a trespass. (And see Hall *v.* Adkins, 59 Mo. 144; Palsey *v.* Kemp, 22 Mo. 409.) A charge of malicious trespass would be actionable. Wilcox *v.* Edwards, 5 Blackf. 183.

[7] Poulton *v.* Rintel, 1 Vict. Law Times, 44.

[8] Hart *v.* Coy, 40 Ind. 535. See Larceny, *ante*, p. 145.

[9] Stephens *v.* Corben, 3 Lev. 394.

d. d. Taken.—Words which charge the taking of the personal property of another, may be slanderous or not, according to circumstances.[1] Ordinarily, *taken* is not equivalent to stolen;[2] but where the words were, I have lost a calf-skin, . . Bornman must have taken it, then they were held to impute a larceny.[3]

e. e. Thief.—To call one a thief is not actionable, unless it is intended to impute to him a felony.[4] Unexplained it will be construed in a felonious sense,[5] but subject to explanation by the context.[6] To say of one, he is

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[1] Watson *v.* Nicholas, 6 Humph. 174.

[2] Robertson *v.* Lea, 1 Stew. 141; Coleman *v.* Playsted, 36 Barb. 26. The words, Thou hast picked my pocket, and *taken away* ten shillings, held not actionable, although the charge of picking the pocket without more would be. (Humfries Case, cited Godb. 287.) Taking away implies a lawful taking. (Foster *v.* Browning, Cro. Jac. 688, pl. 2; Wilks' Case, Vin. Abr. Act. for Words, R, *a*, 3; see Dottarer *v.* Bushey, 16 Penn. St. R. 204.)

[3] Bornman *v.* Boyer, 3 Binn. 515. He is a thief, for he hath *stolen* corn from Mr. Kay, held actionable (Smith *v.* Ward, Cro. Jac. 674), for corn threshed, and not in the sheaf, shall be intended; but if the words had been *hath taken away*, instead of *hath stolen*, no action would lie—a lawful taking would be intended. (Foster *v.* Browning, Cro. Jac. 688, pl. 2.) Thou art as arrant a thief as any in England, for thou hast broken up J.'s chest, and *taken away* £40; not actionable. (*Id.*; see Lukehart *v.* Byerly, 53 Penn. 418.) Thou art a thief, for thou takest my beasts by reason of an execution, and I will hang thee. (Wilks' Case, Vin. Abr. Act. for Words, R. *a*, 3.)

[4] Brite *v.* Gill, 2 T. B. Monroe (Ky.), 66; Quinn *v.* O'Gara, 2 E. D. Smith, 388. See § 281, *post*, and Dwyer *v.* Firemen's Journal, 11 Daly, 248; Van Rensalaer *v.* Cole, 1 Johns. Cas. 279; Brown *v.* Myers, 40 Ohio St. 99; 29 Alb. L J. 169.

[5] Penfold *v.* Westcote, 2 Bos. & P. N. R. 335; Curtis *v.* Curtis, 10 Bing. 447; Fisher *v.* Rotereau, 2 McCord, 189; Dudley *v.* Robinson, 2 Ired. 141; McNamara *v.* Shannon, 8 Bush (Ky.), 557; Miller *v.* Johnson, 79 Ill. 58; McGregor *v.* Eakin, 3 Bradw. (Ill.) 214; Pink *v.* Catanich, 51 Cal. 420; Stumer *v.* Pitchman, 15 No. East. Rep. 757. The words, He is a thief and a liar, and I can prove it, import a charge of larceny, and are actionable. (Robinson *v.* Keyser, 2 Foster [New Hamp.], 323.)

[6] Thompson *v.* Bernard, 1 Camp. 48; Cristie *v.* Crowell, Peake's Cas. 4; McKee *v.* Ingalls, 4 Scam. 30; Ogden *v.* Riley, 2 Green, 186; Vin. Abr. Act. for Words, G. *a*, 1, 2. To say, "Thou art as very a thief as any in Warwick gaol," no thief being then in the gaol, would not be actionable, but if a thief is in the gaol at the time, the words would be actionable. (Fenner, J., 1 Bulst. 40) "He is a swindler and thief, and stole $8,000 from me," these words, explained to mean only that by false entries plaintiff had defrauded defendant, were held not actionable. (Stone *v.* Katz, 38 Wis. 156.) And so of the words, "You have cheated and robbed orphan children out of fourteen hundred dollars." (Filber *v.* Dauterman, 28 Wis. 124.) I know enough to put you in gaol, imputes a crime. (Webb *v.* Beavan, 11 Q. B. D. 609.) The charge, "A B. is stealing my corn," is, of itself, actionable, but when at the same time de-

a thieving person,[1] or "he gets his living by thieving,"[2] is the same as saying he is a thief.

f. f. Threatening Letters.—A charge of sending threatening letters, and that the plaintiff had been indicted therefor, must mean that they were unlawful threatening letters.[3]

g. g. Unnatural Offense.—To allege that one has been with a beast,[4] was seen *ravishing* a cow, amounts to a charge of buggery;[5] but an allegation that one was seen "*a foul* of a cow," or "*with a* heifer,"[6] does not amount to a charge of buggery. To say of one, his character is infamous, he would be a disgrace to any

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fendant communicated the facts of the taking, which he *bona fide* believed to be larcenous, held not actionable; as defendant explained the circumstance, there was no malice. (Hall *v.* Adkins, 59 Mo. 144; and see Pasley *v.* Kemp, 22 Mo. 407.) Accompanied by a statement of qualifying circumstances, the words, "The fact is, he is a villain and a thundering thief," were held not actionable. (Fellowes *v.* Hunter, 18 Up. Can. Q. B. Rep. 382.) "Myers is a thief and ought to have been in the Penitentiary long ago," these words spoken being shown to relate to a transaction not amounting to a crime and that fact known to the hearers, held not actionable. (Brown *v.* Myers, 16 The Reporter, 182; Carmichael *v.* Shiel, 21 Ind. 66; Williams *v.* Miner, 18 Conn. 473.)

[1] Alley *v.* Neeley, 5 Blackf. 200.

[2] Rutherford *v.* Moore, 1 Cranch C. C. 388.

[3] Harvey *v.* French, 1 Cr. & M. 11; affi'd, 2 Moo. & Sc. 591. "Threatening letters. The grand jury have returned a true bill against a gentleman named French," construed to mean that the grand jury had found a true bill against French for sending threatening letters, but that the words would not bear the meaning that French had sent threatening letters to extort money. (*Id.*) The Penal Code of New York provides: § 254. A person who threatens another of a libel, concerning the latter or concerning any parent, husband, wife, child or other member of the family of the latter, and a person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort, money or other valuable consideration from any person, is guilty of a misdemeanor. By Act of Congress all matter, otherwise mailable by law, upon the envelope or outside cover of which, or postal card upon which . . . "libelous, scurrilous, or threatening delineations, epithets, terms or language, or reflecting injuriously upon the character or conduct of another, may be written or printed, are declared to be non-mailable matter, and shall not be conveyed in the mails nor delivered from any Post Office nor by any letter carrier." The act further provides, as a penalty for depositing such objectionable matter in a Post Office, a fine of from $100 to $5,000, or imprisonment at hard labor from one to ten years, or both. (U. S. *v.* Mathias, 36 Fed. Rep. 892; U. S. *v.* Clark, 37 *Id.* 106.)

[4] Woolcott *v.* Goodrich, 5 Cow. 714.

[5] Harper *v.* Delp, 3 Ind. 225.

[6] *Id.;* Johnson *v.* Hedge, 6 Up. Can. Q. B. Rep. N. S. 337.

society; I will publish his infamy; delicacy forbids me bringing a direct charge, but it was a male child who complained to me; held, without an innuendo, to impute unnatural practices.[1]

h. h, *Whore.*—To assert that "A. is a whore, or else she would never ride with B.," is to assert that A. is a whore.[2]

i. i.—To say, there is strong reason to believe,[3] or there is a rumor,[4] or if report be true,[5] a certain fact occurred, is equivalent to an allegation that such fact occurred; and so to say, I would venture anything,[6] or public opinion says so, and what public opinion says I believe to be true,[7] or I have every reason to believe,[8] is equivalent to a positive allegation. But the words "Sparkham did steal *or else* Godwin is forsworn," was held too indirect a charge to give a right of action,[9] so of the allegation, she had a child, and either she or some one else made away with it.[10]

j. j.—To say of one, he is thought no more of than a horse-thief and a counterfeiter, is to call him a horse-thief and a counterfeiter;[11] and when it is said of one, he has committed an act for which he could be trans-

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[1] Woolnoth *v.* Meadows, 5 East, 463. See note 3, on p. 118, *ante.*

[2] True *v.* Plumley, 36 Me. 466; Bassil *v.* Elmore, 65 Barb. 627; affi'd, 48 N. Y. 561; Rhodes *v.* Anderson, 13 Atl. Rep. 823. "E. P. was one week in L. in a whore-house," implies a charge of whoredom. (Blickenstaff *v.* Perrin, 27 Ind. 527.) Bitch does not import whoredom, and no innuendo can give it that meaning. (Schurick *v.* Kollman, 50 Ind. 336. See Kelly *v.* Flaherty, 14 Atl. Rep. 876.) Bad woman, jury to consider what intended. (Riddle *v.* Thayer, 127 Mass. 487.)

[3] Turner *v.* Merryweather, 12 Law Times, 474; 7 C. B. 251.

[4] Kelly *v.* Dillon, 5 Porter (Ind.), 426.

[5] Smith *v.* Stewart, 5 Barr. 372; Johnson *v.* Brown, 57 Barb. 118.

[6] Nye *v.* Otis, 8 Mass. 122.

[7] Gage *v.* Shelton, 3 Rich. 242; and see note 1, p. 140, *ante.*

[8] Logan *v.* Steele, 1 Bibb. 593; and see note 2, p. 140, *ante.*

[9] 1 Starkie on Slander, 70.

[10] Carth. 55. The words thy brother was whipped for stealing sheep, or burned in the hand or shoulder, held too uncertain to warrant an action, as one could not be burned in the shoulder for stealing sheep. (Stirley *v.* Hill, Cro. Car. 283.)

[11] Nelson *v.* Musgrave, 10 Mo. 648.

ported, it must be understood he has been guilty of a crime punishable by transportation.[1]

k. k.—To charge, he has broken open my letters in the post-office, do not import an unlawful breaking open.[2]

l. l.—Thou canst not *read* a declaration, construed to mean from ignorance, not blindness.[3]

m. m.—The words "we again assert the cases formerly put by us on record; we assert them against [the plaintiff]; we again assert they are such as no gentleman or honest man would resort to." Construed not to be a mere denial of some assertion made by plaintiff, but as an accusation against the plaintiff.[4]

n. n.—"He was an United Irishman, and got the money of the United Irishmen into his own hands and ran away with it," imputes a breach of trust, not a felony and not actionable.[5]

§ 145. What allegations are divisible. One rule whereby to test whether a charge is divisible or not, is to inquire if the measure of damages would be different for the whole or for a part; and if it would, then the charge is divisible, and part may be justified.[6] Another rule would be to inquire if a part of the charge would sustain an action. Where the charge was that the plaintiff, a proctor, had been suspended three times for extortion, held divisible, and that the defendant might justify as to one sus-

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[1] Curtis *v.* Curtis, 4 Moo. & Sc. 337; 10 Bing. 477.

[2] McCuen *v.* Ludlum, 2 Harrison (17 N. J. Law), 12; Hillhouse *v.* Peck, 2 Stew. & Por. (6 Ala. O. S.) 395. A charge of stealing letters and keeping them for extortion is actionable. (Smith *v.* Coe, 22 Minn. 276.)

[3] Powell *v.* Jones, 1 Lev. 297.

[4] Hughes *v.* Rees, 4 M. & W. 204.

[5] M'Clurg *v.* Ross, 5 Binn. 218. Charge of embezzling goods not actionable. (Caldwell *v.* Abbey, Hardin [Ky.], 529; and see Hawn *v.* Smith, 4 B. Monr. 385, and *contra* Menmer *v.* Simpson, 12 Daly, 156.)

[6] Clarkson *v.* Lawson, 6 Bing. 587; Cooper *v.* Lawson, 1 Perr. & D. 15; Churchill *v.* Hunt, 2 B. & Ald. 685.

pension.[1] Where the alleged defamatory matter professed to give a report on an election petition, and commented on a person, bail for one of the petitioners, and stated "he is hired for the occasion," held divisible.[2] The charge was, acts of barbarity to a horse, and "beating out one of his eyes, and that plaintiff had ordered the person having charge of the horse not to let any one see it," held divisible.[3] So of the words: Ware, hawk, you must take care of yourselves there, mind what you are about;[4] and where the charge was that plaintiff had killed his adversary in a duel, and that a portion of the night preceding the duel was spent in practicing with a pistol, held to be divisible allegations;[5] and where the charge was that the plaintiff had, by furious driving, caused the death of a person, and then commented, in terms held to be actionable, on the fact of the plaintiff, on the same evening, attending a public ball, held that the charges were divisible;[6] so of the words, she is a forsworn whore and a perjured whore.[7] and thou art a roguish knave and a thief.[8] Where the charge was that plaintiff was in prison and unable to pay his rent, and a mere man of straw, held not divisible, but one charge of insolvency.[9] A charge of robbery to a *seri-*

[1] Clarkson *v.* Lawson, 6 Bing. 587.

[2] Cooper *v.* Lawson, 1 Perr. & D. 15.

[3] Weaver *v.* Lloyd, 2 B. & Cr. 678; 4 D. & R. 230.

[4] Orpwood *v.* Barkes, 4 Bing. 261; S. C. *sub nom.* Orpwood *v.* Parkes, 12 Moore, 492.

[5] Helsham *v.* Blackwood, 11 C. B. 111; 5 Eng. Law & Eq. R. 409.

[6] Churchill *v.* Hunt, 2 B. & Ald. 685; 1 Chit. 480.

[7] Wales *v.* Norton, Hard. 7.

[8] Bailey *v.* Maynard, 2 Bulst. 134.

[9] Eaton *v.* Johns, 1 Dowl. Pr. C. N. C. 602. Where the charge was that defendant had been obliged to get rid of plaintiff, "in consequence of frauds and delinquency," and that "these Sutherlands have been trading on my capital for the last twelve years to their own benefit, and they will do the same with your property, or that of any other they can get hold of," held these charges were to be taken in conjunction, and could not be justified by showing the plaintiff guilty of revenue frauds. (Sutherland *v.* McDonald, 3 Menzies Rep. N. S. 6.)

The libel was: "Defendant complained to plaintiff that a ditch on plaintiff's premises was injurious to public health and a nuisance; that plaintiff, after fencing with defendant, refused to do anything; that proceedings taken to remove the nuisance were defeated by technical objections on plaintiff's part; that the ditch was a nuisance which had occasioned fever in the neighborhood, of which plaintiff

ous amount is divisible.[1] Allegations of time, and space, and number are divisible.[2]

had notice; and that the nuisance continued unabated." Plea justifying as true parts of the libel. Jury found some allegations of plea true and some not true—held the issue was indivisible. (Biddulph *v.* Chamberlayne, 17 Q. B. 351.)

[1] Starkie on Slander, 484.

[2] Monkman *v.* Shepherdson, 3 Perr. & D. 182; 11 Ad. & El. 411; so said in argument. Page *v.* Hatchett, 6 Law Times, 218; and as to divisible allegations, see McGregor *v.* Gregory, 2 Dowl. Pr. C. N. S. 769; 11 M. & W. 289; Wilson *v.* Pattrick, 3 C. B. 772; Mountney *v.* Watson, 2 B. & Ad. 673; Tapley *v.* Wainwright, 5 B. & Ad. 395; cited Dunckle *v.* Wiles, 6 Barb. 523; Vessey *v.* Pike, 3 C. & P. 512; Berry *v.* Adamson, 2 C. & P. 503; O'Connell *v.* Mansfield, 9 Irish Law Rep. 179; Edwards *v.* Bell, 1 Bing. 403; Lewis *v.* Walter, 4 Dowl. & R. 810; 3 B. & Cr. 138; Johns *v.* Gittings, Cro. Eliz. 239; Vin. Abr. Actions for Words, *F*, *a*, 43; Heard on Libel, 286, *note* 2, and 4 M. & S. 548; Chalmers *v.* Shackell, 6 C. & P. 475; see § 212, *post*.

CHAPTER VIII.

WHAT LANGUAGE IS ACTIONABLE.

Language must be such as does or does not occasion damage—What is meant by actionable per se, and actionable by reason of special damage—What language concerning a person as such, published orally, is actionable per se—What language concerning a person as such, published in writing, is actionable per se—What language concerning one in an acquired capacity, is actionable per se—What language concerning a person is actionable by reason of special damage—What language concerning the affairs of a person, his property, or his title thereto, is actionable.

§ 146. All language concerning a person or his affairs, which, as a necessary or natural and proximate consequence, occasions him pecuniary loss, is *prima facie* actionable (§§ 57, 59, 70). Language must be either (1) such as necessarily, in fact, or by a presumption of evidence, occasions damage to him of whom or whose affairs it is concerning; or, (2) such as does not necessarily, or as a necessary consequence, but does by a natural and proximate consequence, occasion damage to him of whom or whose affairs it is concerning; or, (3) such as neither as a necessary nor as a natural and proximate consequence occasions damage to him of whom or of whose affairs it is concerning.[1]

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[1] In the jurisprudence of Louisiana, a distinction is not made between words actionable and words not actionable, as the basis of damages in a suit for slander, where no special damages are proved. (Feray *v.* Foote, 12 La. Ann. 894; Miller *v.* Holstein, 16 La. Ann. 389; Daly *v.* Van Benthuysen, 3 La. Ann. 69; Tuscan *v.* Maddox, 11 La. Ann. 206; Cass *v.* Times, 27 La. Ann. 214; Spotorno *v.* Fourichon, 4 So. Rep. 71.)

necessary consequence," is
ensues as a "*natural and*
"*special damage*." One
both necessarily occasion
age as a natural conse-

of these classes is com-
actionable *per se*, because
facie right of action, and is
evidence of damage other
esumed from the fact of
e of this class might more
er se, or language which

anguage of the second of
nfer a *prima facie* right of
facie wrong. It confers
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tion.

lain, in Chapter IV, that
ed, is the gist of the action
ated (pp. 42, 43) the basis
between words actionable
by reason of special dam-
of evidence; the rule by
shall be considered by

[1] ... written slander may be an action for ... slanderous words," within the Ver... ...ent judiciary act. (Parsons *v.*

their publication *necessarily* to occasion pecuniary loss or damage. The courts, while exercising this power, have failed to promulgate a formula which can be applied with any degree of certainty, to distinguish the cases in which damage is necessarily implied, from the cases in which no such implication occurs, and in which, to give a right of action, special damage must be proved.

§ 151. As the injurious, or presumed injurious effect of language depends upon whether (1) the language concerns a person or a thing, (2) or the person as such or in some acquired capacity, or (3) in certain cases, whether the language be published orally or by writing, it will be necessary to consider the topic of actionable language under the following heads:

I.—What language concerning a person, as such, published orally, is actionable *per se.*

II.—What language concerning a person, as such, published in writing, is actionable *per se.*

III.—What language concerning one in an acquired capacity or special character, as in a business, profession, or office, or as a partner, or as heir-at-law, is actionable *per se.*

IV.—What language is actionable by reason of special damage.

V. What language concerning things, as the affairs of a person, his property, or his title thereto, is actionable.

§ 152. What language concerning a person, as such, published orally, is actionable *per se.* Although it has been said that "The law of England defines with much greater distinctness than is usually found in other codes,

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Young, 2 Vt. 434: but see § 53, *ante.*) And in Hall *v.* Warner (T. 24 Geo. III), Tidd, 861, held that an action for libel was not within the statute 21 Jac. I, ch. 16, relating to actions for "slanderous words."

the limits of the civil action for oral slander in the absence of special damage,"[1] it is nevertheless true that "There is not perhaps so much uncertainty in the law upon any subject as when words shall be in themselves actionable."[2] "The line of demarcation seems never to have been satisfactorily defined,"[3] and is "more satisfactorily determined by an accurate application of the principles upon which actions on the case for words depend, than by a reference to adjudged cases, especially those in the more ancient authors."[4] The diversity of opinion as to what words should be treated as imputing damage, or actionable *per se*, arose from a wavering in the minds of the judges between two opposite inconveniences. The fear of encouraging a spirit of vexatious litigation, by affording too great a facility for this species of action, was contrasted with the mischief resulting to the public peace from refusing legal redress; and according as the former or latter of these considerations preponderated, so was the rule of decision rigid or relaxed.[5]

§ 153. Several of the States provide by statute what words shall be actionable; thus, in Mississippi, Virginia,[6] and Georgia, it is enacted that all words which, from their usual construction and common acceptation, are considered as insults, and lead to violence and breach of the peace, shall be actionable.[7] In Tennessee, imputing orally

[1] Prelim. Discourse to Starkie on Slander, XXX (30) note v; see note to § 57, *ante*. In Scotland, any words that produce "uneasiness of mind" are said to be actionable. (Borthwick on Libel, 184, note.) But words merely "uncivil" are not actionable. In Iceland, to say of a gentleman, he did menial labor, is punishable. (Blackwood's Magazine, Feb'y, 1869.) Mere words of obloquy, not written, are not actionable. (Johnson *v.* Brown, 4 Cranch C. C. 235.)

[2] Spencer, J., Brooker *v.* Coffin, 5 Johns. 192.

[3] Borthwick on Libel, 5. Lord Holt said it was not worth while to be learned on the subject. (Baker *v.* Pierce, 6 Mod. 24.)

[4] 1 Comyn's Dig. 273, note, 4th edit.

[5] 1 Starkie on Slander, 12.

[6] Rolland *v.* Batchelder, 5 So. East. Rep. 695. The Virginia Code applies to written as well as spoken works. (Chaffin *v.* Lynch, 83 Va. 106.)

[7] It is not necessary, to support an action under these statutes, that the words should have been spoken in the

or in writing, adultery or fornication, or calling one coward or poltroon for not fighting a duel, or otherwise insinuating such a charge, is actionable.[1] In Arkansas and Illinois, to impute adultery, fornication, or false swearing, or having sworn [or affirmed in Illinois] falsely in common acceptation, whether in a judicial proceeding or not, is actionable. In Missouri, to impute adultery or fornication is actionable.[2] In Indiana, to impute to a female incest, fornication, adultery, or whoredom, or to impute to any one incest, or an infamous crime against nature with man or beast, is actionable.[3] In Florida, *a charge by any* citizen of that State against another, imputing incest, fornication, or adultery, is actionable.[4] In North Carolina, any words written or spoken of a female which amount to a charge of incontinency, are actionable;[5] and, in Maryland, all words tending to the injury of the reputation for chastity of a *feme sole*, are actionable.[6] In Michigan, willfully to insult or indecently to annoy any female, with any obscene or indecent word or act, is a misdemeanor; and, in New York,[7] "An action may be maintained by a female, whether

presence of the plaintiff. (Scott *v.* Peebles, 2 Smedes & Marsh. 546.)

[1] Coward held actionable at common law. (Hill *v.* Wallace, 1 Menzies Rep. 347.) But held not actionable to say of plaintiff, the head of a commando (or burgher force), that he was by no means exculpated from the suspicion, at least, of having forced them to a disgraceful retreat. (Ryneveld *v.* Bain, 3 Menzies Rep. 11.)

[2] Steiber *v.* Wensel, 19 Mo. 513; and in Iowa, Call *v.* Larabee, 60 Iowa, 212; and in California, Nidever *v.* Hall, 67 Cal. 80.

[3] The Statute is Constitutional. (Emmerson *v.* Marvel, 55 Ind. 265.) See Binford *v.* Young, 16 No. East. Rep. 142; Buscher *v.* Scully, 107 Ind. 246, saying of an unmarried female, she was getting fat; some one had slipped up on the blind side of her, held not actionable *per se*. (Emmerson *v.* Marvel, 55 Ind. 265.) In North Carolina, see State *v.* Moody, 4 So. East. Rep. 119. In Rhode Island, see Kelly *v.* Flaherty, 14 Atl. Rep. 876. In Quebec, calling an unmarried woman une putain actionable. (Denis *v.* Thioret, 5 Leg. News, 163.)

[4] In Wisconsin a charge of fornication is actionable. (Gibson *v.* Gibson, 43 Wis. 23.)

[5] State *v.* Moody, 4 So. East. Rep. 119; State *v.* Brown, 6 *Id.* 568; and in Minnesota, Rietan *v.* Goebel, 22 No. West. Rep. 291.

[6] See in note, p. 20, *ante*, and § 172, *post*, and note.

[7] Laws N. Y. 1871, ch. 219, and N. Y. Code of Civ. Proc. § 1906, and see a similar law in New Jersey. (Revised Code, Art. 22;) in Maryland, (Heming *v.* Elliott, 5 Cent. Rep. 592;) in Louisiana, see Williams *v.* McManus, 38 La. Ann. 161. The words to a female, "Go over to my office; my wife is particular what company

married or single, to recover damages for words hereafter spoken, imputing unchastity to her, and it shall not be necessary to allege or prove special damages in order to maintain such action. In such actions, a married woman may sue alone, and any recovery therein shall be her sole and separate property."

§ 153*a*. In the absence of any statutory provision on the subject, all language concerning a person in his individual capacity merely, when published orally, is actionable *per se*, which,

I. Charges an indictable offense involving moral turpitude; or,

II. Charges the being afflicted with certain diseases.

§ 154. In New York, oral language is actionable *per se*, when it imputes a charge which, if true, will subject the party charged to an indictment for a crime involving moral turpitude, *or* subject him to an infamous punishment. This was the rule laid down by Justice Spencer, in Brooker *v.* Coffin,[1] and as to which Justice Bronson said, that, although it was not entirely satisfactory to his mind, he felt bound to follow it.[2] It was proposed by counsel to modify the rule as stated above, by altering *or* into *and*, but the court refused assent to the suggestion,[3] and the

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she keeps; she does not wish to be annoyed by such characters as you." Held not actionable, not charging unchastity. (McMahon *v.* Hallock, 15 N. Y. St. Rep. 828.) Unchastity in a woman means one who has had unlawful sexual intercourse, or is guilty of such conduct as would tend to indicate that she was willing so to do. (Mason *v.* Stratton, 17 N. Y. St. Rep. 302.) What amounts to a charge of unchastity. (*Id.*) The Roman civil law gave a woman her action for uttering obscene words in her presence. (See supposed reason of this law, Disney's Ancient Laws against Immoralities, &c., tit. 1, chap. 1.) Where a married woman fails in an action for slander or libel, she is not liable to imprisonment on an execution against her person for the costs. The costs can be collected only out of her separate estate. (Maloy *v.* Dagnal, 1 Sup. Ct. Rep. [T. & C.], Addenda, 10; § 267, 300, *post*.)

[1] 5 Johns. 188. See Brooks *v.* Harrison, 91 N. Y. 83.

[2] Young *v.* Miller, 3 Hill, 22.

[3] Widrig *v.* Oyer, 13 Johns. 124. Held, that words imputing that plaintiff had been guilty of a *criminal* offense will support an action for

rule, as laid down in Brooker *v.* Coffin, has been followed in numerous cases in New York and other States.[1] In reference to the above rule it has been remarked that, "when the courts say the words are actionable if they subject the party to indictment and *infamous* punishment, provided they are true, we clearly understand what is the extent of the rule;" but when they add "or subject the party to an indictment for an offense involving *moral turpitude*, we are left in doubt what charges are embraced within the sentence; it lacks precision."[2] And again, "this element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community."[3] Chief Justice Parker refused to adopt the rule as laid down in Brooker *v.* Coffin, *supra*, and laid down the rule as thus: An accusation is action-

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slander without an allegation that the words impute an *indictable* offense. (Webb *v.* Beavan, 11 Q. B. D. 609; Stroebel *v.* Whitney, 31 Minn. 34; Bradley *v.* Cramer, 18 No. West. Rep. 268.) By statute in New York, a mortgagor of chattels, who afterwards sells them, without disclosing the fact of the mortgage, is guilty of a misdemeanor, and held that the words, "Vaus is a rascal not to be trusted; I have papers on which he could be sent to State prison; he gave me a chattel mortgage, and sold the property before paying the mortgage," were actionable. (Vaus *v.* Middlebrook, 3 N. Y. St. Rep. 277.) In Wisconsin it is a misdemeanor to furnish watered milk to a factory and therefore actionable in that State to charge one with such an offense. (Geary *v.* Bennett, 10 No. West. Rep. 602.) See 91 N. Y. 89.

[1] Wright *v.* Paige, 36 Barb. 438; affi'd, 3 Trans. App. 134; Quinn *v.* O'Gara, 2 E. D. Smith, 388; Martin *v.* Stillwell, 13 Johns. 275; Burtch *v.* Nickerson, 17 Johns. 219; Van Ness *v.* Hamilton, 19 Johns. 367; Gibbs *v.* Dewey, 5 Cow. 503; Demarest *v.* Haring, 6 Cow. 88; Crawford *v.* Wilson, 4 Barb. 504; Alexander *v.* Alexander, 9 Wend. 141; Hoag *v.* Hatch, 23 Conn. 590; Redway *v.* Gray, 31 Vt. 292; Andres *v.* Koppenheafer, 3 Serg. & R. 255; Todd *v.* Rough, 10 Serg. & R. 18; McCuen *v.* Ludlum, 2 Harrison (17 N. J. L.), 12; Johnson *v.* Shields, 1 Dutcher (25 N. J. L.), 118; Giddens *v.* Mirk, 4 Ga. 360; Burton *v.* Burton, 3 G. Greene (Iowa), 316; Gage *v.* Shelton, 3 Rich. 242; Kinney *v.* Hosea, 3 Harr. 77; Coburn *v.* Harwood, Minor, 93; Perdue *v.* Burnett, Minor, 138; Hillhouse *v.* Peck, 2 Stew. & Por. (6 Ala. O. S.) 395; Johnson *v.* Morrow, 9 Porter, 525; Taylor *v.* Kneeland, 1 Doug. (Mich.) 67; Beck *v.* Stitzel, 21 Penn. St. R. 522; Billings *v.* Wing, 7 Vt. 439; The State *v.* Burroughs, 2 Halst. 426; 1 Amer. Lead. Cas. 113, 3d ed.

[2] Daniel, J., Skinner *v.* White, 1 Dev. & Bat. 471; and see Brady *v.* Wilson, 4 Hawks, 93; Wall *v.* Hoskins, 5 Ired. 177; Shipp *v.* McCraw, 3 Murph. 463.

[3] Lowrie, J., Beck *v.* Stitzel, 21 Penn. St. Rep. 522.

able whenever an offense is charged which, if proved, may subject the party to a punishment, though not ignominious, and which brings disgrace upon him.[1] The same judge has also laid down the rule as thus: "Words imputing crime in the party against whom they are spoken, which, if true, would subject him to disgraceful punishment, are actionable without special damages."[2] To render the imputation of a crime actionable, there needs not the same certainty in stating the crime as in an indictment for such a crime.[3]

§ 155. The following offenses, among others, have been held to involve *moral turpitude:* Keeping a bawdy-house,[4] removing landmarks,[5] selling spirituous liquor to a slave,[6] paying money to secure election as a justice of the peace,[7] opening a letter addressed to another,[8] altering the

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[1] Miller *v.* Parish, 8 Pick. 385.

[2] Chaddock *v.* Briggs, 13 Mass. 248; and to the like effect, Bloss *v.* Tobey, 2 Pick. 320. "Words to be actionable must charge an offense subject to corporal or infamous punishment." (Elliott *v.* Ailsberry, 2 Bibb, 473; McGee *v.* Wilson, Lit. Sel. Cas. 187.) Words are not actionable *per se* when "they impute no crime which could be visited by infamous punishment." (Buck *v.* Hersey, 31 Maine, 558; Gosling *v.* Morgan, 32 Penn. St. Rep. [8 Casey], 273.) The charge of a misdemeanor, to be actionable *per se,* must be one which "implies some heinous offense involving moral turpitude." (Miller *v.* Wimp, 10 B. Monr. 417; Dottarer *v.* Bushey, 4 Harris [16 Penn. St.], 204; Stitzel *v,* Reynolds, 9 P. F. Smith [59 Pa. St.], 488.) An indictment lies for many acts not involving moral turpitude. (Quinn *v.* O'Gara, 2 E. D. Smith, 388.)

Words charging an offense involving moral turpitude and indictable, although not subjecting the offender to infamous punishment, are actionable in themselves. (Purdee *v.* Burnett, Minor, 138.)

Any words which, according to their natural import, impute a crime or misdemeanor, which is punishable in the temporal courts by corporal punishment, are actionable in themselves. (Demarest *v.* Haring, 6 Cow. 76.)

"An action will lie for all words spoken of another, which impute to him the commission of a crime involving moral turpitude, and which is punishable by law." (Heard on Libel, 25.)

[3] Miller *v.* Miller, 8 Johns. 58, 60; Rundell *v.* Butler, 7 Barb. 260; Bihler *v.* Gockley, 18 Bradw. (Ill.) 496; Vaus *v.* Middlebrook, 3 N. Y. St. Rep. 277; and see Hoar *v.* Ward, 47 Vt. 657; Waugh *v.* Waugh, 47 Ind. 580.

[4] Martin *v.* Stillwell, 13 Johns. 275; Brayne *v.* Cooper, 5 M. & W. 249; Wright *v.* Paige, 36 Barb. 438; 3 Trans. App. 134. See § 173, *post.*

[5] Young *v.* Miller, 3 Hill. 24; Todd *v.* Rough, 10 S. & R. 18; Dial *v.* Holter, 6 Ohio St. 228.

[6] Smith *v.* Smith, 2 Sneed, 473.

[7] Hoag *v.* Hatch, 23 Conn. 585.

[8] Cheadle *v.* Buell, 6 Ham. 67; *contra,* McCuen *v.* Ludlum, 2 Harr. (17 N. J. Law), 12; and see Hillhouse

owner's marks on animals,[1] soliciting one to commit murder,[2] indecent exposure of the person,[3] embracery,[4] making a false declaration of a right to vote,[5] and counterfeiting.[6]

§ 156. In some of the States, it seems that all oral language which imputes an indictable offense or an offense punishable at law, is actionable *per se;* thus it is said: "All that is essential to the maintenance of the action for slander is that the words shall impute the commission of a punishable offense."[7] To be actionable, the effect of the language must be, "to charge some crime or offense punishable by law;"[8] "a charge of crime or some punishable offense;"[9] or "words imputing to another a crime punishable by law;"[10] or "an indictable offense."[11] While in other States it is held that words, to be actionable, must impute not only an indictable offense, but an indictable offense for which corporal punishment may be inflicted as the immediate penalty.[12]

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v. Peck, 2 Stew. & Port. (6 Ala. O. S.) 395.

[1] Perdue *v.* Burnett, Minor, 138.

[2] Demarest *v.* Haring, 6 Cow. 76.

[3] Torbitt *v.* Clare, 9 Irish Law Rep. 86.

[4] Gibbs *v.* Dewey, 5 Cow. 503; see *ante*, § 144, subd. *j*.

[5] Crawford *v.* Wilson, 4 Barb. 505.

[6] Howard *v.* Stephenson, 2 Const. Rep. 2d series, 408; Thirman *v.* Matthews, 1 Stew. (2 Ala. O. S.) 384. All words imputing a crime are actionable. (Deford *v.* Miller, 3 Penn. 103.) See Arson, Forgery, Larceny, Perjury, Homicide. Words charging that plaintiff administered morphine to another on the day he made his will, and that "if it had not been for that, the plaintiff's daughters would not have got what they did," held actionable. (McFadin *v.* David, 78 Ind. 445.)

[7] McKinney, J., Poe *v.* Grever, 3 Sneed, 666. "Words which impute trespass, assault, battery, and the like, are not actionable *per se*, and yet these offenses are punishable by indictment." (Smith *v.* Smith, 2 Sneed, 478; Dudley *v.* Horn, 21 Ala. 379; Billings *v.* Wing, 7 Vt. 444.) Oral language, to be actionable, must impute something criminal or that would exclude from society. (Colby *v.* Reynolds, 6 Vt. 489.)

[8] Dunnell *v.* Fiske, 11 Metc. 552.

[9] Edgerly *v.* Swain, 32 New Hamp. 481.

[10] Tenney *v.* Clement, 10 New Hamp. 57; Lukehart *v.* Byerley, 53 Penn. St. 418.

[11] Kinney *v.* Hosea, 3 Harring. 77. Action lies for words imputing to a wife the commission of a felony jointly with her husband, but not in his presence. (Nolan *v.* Traber, 49 Md. 460.)

[12] Birch *v.* Benton, 26 Mo. (5 Jones), 153; Billings *v.* Wing, 7 Vt. 439.

§ 157. Judging from the language of many English dicta, the rule in England would seem to be that all oral language is actionable *per se* which imputes a crime or indictable offense.[1] "An action lies for any words which import the charge of a crime for which the party may be indicted."[2] "The test is, whether the crime is indictable or not."[3] "Where an offense of a criminal nature is imputed by the slander, for which the party is liable to indictment or punishment by the common or statute law, those words are actionable *per se*."[4] "It is well known that words are not actionable unless they impute some crime or indictable offense."[5] "The words, to be actionable, must impute a criminal offense; that is, the words, if true, must be such that the plaintiff would be guilty of a criminal offense."[6] While other decisions seem to require that an of-

[1] I will lock you up in Gloucester gaol; I know enough to put you there, meaning that plaintiff had been guilty of some criminal offense, held actionable. (Webb *v.* Beavan, 11 Q. B. D. 609.) Pollock, B., Words which allege any criminal offense are actionable *per se*. Lopez, J., I think it enough to allege that the words impute a criminal offense. (*Id.*, and see in note to § 163, *post*.) The words: "This man obtained from me $30 upon a promise to get me work; he now refuses to give me work or my money," held not actionable. (Burbato *v.* De Libero, City Co't, N. Y., April, 1888.)

[2] Mayne *v.* Digle, Freeman, 46. Words, to be actionable in themselves, must charge some *scandalous* crime; they must be such as to impute to the party an offense for which he may be indicted. (Walmsley *v.* Russel, 6 Mod. 200.) In Smale *v.* Hammon (1 Bulst. 40) it was said where the words spoken do tend to the infamy, discredit or disgrace of the party, they shall be actionable; but this dictum was said to go too far. (Holt *v.* Scholefield, 6 T. R. 691.) In Scoble *v.* Lee (2 Show. 33) it was held not actionable to call one *regrator*, because *regrating*, although criminal, was not punishable by loss of life or limb. In ancient books we do not read of an action for words unless the slander concerned life. (Vaughan, Ch. J., King *v.* Lake, 2 Vent. 28.)

[3] Comyn's Dig. Actions for Defamation, F. 20.

In slander for saying that plaintiff robbed his wife of £75 before her removal to a lunatic asylum, and was anxious to get rid of her, in order that he might take the remainder of her money.

Held, that as such words did not impute to plaintiff that he stole his wife's money while they were living apart, or when he was about to leave or desert her, they were not actionable, inasmuch as they did not, even under the Married Woman's Property Act of 1882, 45 & 46 Vict. c. 75, impute an indictable offense. (Lemon *v.* Simmons, 57 L. J. Q. B. 260; 36 Week. Rep. 351.)

[4] 2 Saund. Pl. & Ev. 898, 2d Eng. ed.

[5] Tyndall, Ch. J., Edsall *v.* Russell, 5 Sc. N. R. 815; 2 Dowl. N. S. 648; 4 M. & G. 1099; 12 Law Jour. N. S. C. B. 7.

[6] Alderson, B., Heming *v.* Power, 10 M. & W. 570.

fense must be imputed which would not only subject the party charged to imprisonment, but to an infamous punishment. To make the words actionable *per se*, "there must not only be imprisonment, but an infamous punishment;"[1] and, therefore, in that case, it was held that the words, "Thou art one of those that stole my Lord Shaftesbury's deer," were not actionable *per se*, because, although the offense of deer stealing was punishable by imprisonment, it was not an *infamous* punishment.[2] "The words [to be actionable] must contain an express imputation of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor."[3] Mr. Starkie says: "Perhaps it may be inferred generally, that to impute any crime or misdemeanor for which corporal punishment may be inflicted in a temporal court is actionable, without proof of special damage. Where the penalty for an offense is merely pecuniary, an action will not lie for charging such offense,[4] even though in default of payment imprisonment should be prescribed, imprisonment not being the primary and immediate punishment for the offense."[5]

[1] Holt, Ch. J., Turner *v.* Ogden, 2 Salk. 696.

[2] Mr. Bigelow, note to Odgers on Libel, 84, says there is no such thing in the present day as an infamous punishment, except the whipping-post of Delaware. See Klumph *v.* Dunn, 66 Penn. St. 141.

[3] De Grey, Ch. J., Onslow *v.* Horne, 3 Wilson, 186. This rule, says Mr. Heard (Heard on Libel, 16), is universally referred to as the correct rule, and was repeated in Holt *v.* Scholefield, 6 T. R. 694, and in Beardsley *v.* Dibblee, 1 Kerr (New Bruns.), 258, and adopted in Shaffer *v.* Kintzer, 1 Binn. 542; Andres *v.* Koppenheafer, 3 Serg. & R. 257; Bloom *v.* Bloom, 5 *Id.* 392; Pelton *v.* Ward, 3 Caines, 79; Smith *v.* Smith, 2 Sneed, 478; Johnson *v.* Shields, 1 Dutch. 119. The publication of a libel is not an infamous crime. The People *v.* Parr, 25 Week. Dig. 113; 42 Hun, 313. What is an infamous crime. See *Ex parte* Wilson, 19 The Reporter, 643; State *v.* Bixler, 31 Alb. L. J. 458; McKinn *v.* U. S., 117 U. S. 348.

[4] McCabe *v.* Foot, 18 (11 N. S.) Irish Jurist, 287; 15 L. T. N. S. 115.

[5] 1 Starkie on Slander, 43; 6 Mod. 104. This view of the law is adopted in Billings *v.* Wing, 7 Vt. 439; Wagaman *v.* Byers, 17 Md. 183; and in a note at page 90 of Metcalf's edition of Yelverton's Reports; but is questioned in 1 Amer. Lead. Cas. 112, 2d ed., and in Smith *v.* Smith, 2 Sneed, 478. Saying that plaintiff went to mass was held actionable, because it was by statute an offense punishable by fine and imprisonment. (Sir Lionel Walden *v.* Mitchell, 2 Vent. 265.) And concealing a felony was held actionable at a time when such an offense was punishable by fine only. (Newlyn *v.* Fassett, Yelv. 154.) But the words, thou art a common barrator, it

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[6] It is in this view that
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"He was a thief and stole

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[4] Eastland *v.* Caldwell, 2 Bibb, 24; Smith *v.* Stewart, 5 Barr. 372; Beck *v.* Stitzel, 21 Penn. St. R. 524; Poe *v.* Lever, 3 Sneed, 664.

[5] "In the eye of the law the [pardoned] offender is as innocent as if he had never committed the offense." (*Ex parte* Garland, 4 Wall. 380; U. S. *v.* Padelford, 9 Wall. 542.) "The pardon makes him a new man, and gives him a new capacity and credit." (2 Hawk. P. C. ch. 57, § 48.) See Leyman *v.* Lattimer, 3 Ex. D. 15. In that case plaintiff had been convicted of a felony, sentenced and endured the penalty. By statute, 9 Geo. 4, c. 32, enduring the punishment of a felony has the same effect as a pardon. Defendant published of plaintiff he was "a convicted felon" and "a felon editor," and plaintiff having been convicted of felony was under the circumstances a defense and plaintiff recovered. The court distinguished between saying plaintiff was "a convicted felon" and saying "he had been convicted of felony."

[6] Boston *v.* Tatam, Cro. Jac. 623, and see Cuddington *v.* Willkins, Hobart, 67–81 b.

[7] Baum *v.* Clause, 5 Hill, 196; Van

my gold;"[1] or, "He is a returned convict;"[2] or, "He is a convict and has been in the Ohio penitentiary;"[3] or, "You have been cropped for felony;"[4] or, "Thou wast in Launceston gaol for coining, and burnt in the hand for it;"[5] or, "Robert Carpenter [the plaintiff] was in Winchester gaol and tried for his life, and would have been hanged had it not been for Leggat, for breaking open the granary of farmer A. and stealing his bacon;"[6] or, "He was whipped for stealing hogs;"[7] or, "He was put in the roundhouse for stealing ducks or Crowland;"[8] or, "Thou hast been in gaol for stealing a pan."[9] For the words, "Thou wert in gaol for robbing on the highway," the court was divided if actionable or not;"[10] a charge of committing a statutable offense was held actionable, although intermediate the speaking of the words and the commencement of the action the statute was repealed.[11]

§ 159. Where the offense is charged to have been committed in a foreign State, it will be actionable if it appear that the offense charged is one by the law of that State punishable by indictment, and involving moral turpitude (§ 110). Where the offense charged is one punishable by indictment at common law, it will be presumed to be indictable everywhere; but if the offense charged be one created by statute or punishable by indictment by statute, then, as courts cannot take judicial notice of the statutes of foreign States, to make the charge actionable, the statute relating to the offense charged must be pleaded and proved like any other fact.[12] Thus it is actionable *per se*,

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Ankin *v.* Westfall, 14 Johns. 233; and see *post*, Defenses.

[1] Boston *v.* Tatam, Cro. Jac. 622.

[2] Fowler *v.* Dowdney, 2 Moo. & Rob. 119; and see the reporter's note of this case.

[3] Smith *v.* Stewart, 5 Barr, 372.

[4] Wiley *v.* Campbell, 5 Monr. 396.

[5] Gainford *v.* Tuke, Cro. Jac. 536.

[6] Carpenter *v.* Tarrant, Rep. temp. Hard. 339, cited by Ld. Ellenborough; Roberts *v.* Camden, 9 East, 97.

[7] Holley *v.* Burgess, 9 Ala. 728.

[8] Beavor *v.* Hides, 2 Wils. 300.

[9] Showel *v.* Haman, Cro. Jac. 154.

[10] Smale *v.* Hammon, 1 Bulst. 40.

[11] French *v.* Creath, Breese (Ill.), 12.

[12] Offut *v.* Earlywine, 4 Blackf. (Ind.) 460; Linville *v.* Earlywine, *Id.* 469; Langdon *v.* Young, 33 Vt. 136;

to charge one with stealing in a foreign State or country,[1] or with murder,[2] and an action may be maintained for charging a crime committed in another State, which it would not be actionable to charge the commission of in the State in which the action is commenced.[3]

§ 160. "No charge upon a plaintiff, however foul, will be actionable without special damage, unless it be of an offense punishable in a temporal court of *criminal* jurisdiction,"[4] and therefore at the times when and at the places

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Stout *v.* Wood, 1 Blackf. 71; Barclay *v.* Thompson, 2 Penn. 148; Poe *v.* Grever, 3 Sneed, 664; Sparrow *v.* Maynard, 8 Jones L. (N. C.) 195. Burning a barn is an offense by the statute of Indiana, but not at common law, therefore a charge, "He had to leave Indiana for burning a barn," is not actionable without a *colloquium* of the law of Indiana. (Bundy *v.* Hart, 46 Mo. 460.) Thus the stealing of bank notes not being indictable at common law, to charge a theft of bank notes in South Carolina, was held not to be actionable in North Carolina, unless it was shown that, by the laws of South Carolina, such stealing was subject to an infamous punishment. (Wall *v.* Hoskins, 5 Ired. 177.) A. and B. being in North Carolina, A. charged B. with stealing a note from him in Virginia, and it appearing that stealing notes was a larceny in Virginia, the charge was held to be actionable. (Shipp *v.* McCraw, 3 Murph. [N. C.] 463.)

[1] As to say in Canada, Old Smith [plaintiff] is a damned thief, he stole a cow in the States [United States]. (Smith *v.* Collins, 3 Up. Can. Q. B. R. 1; and see Johnson *v.* Dicken, 25 Mo. [4 Jones], 580; Cefret *v.* Burch, 1 Blackf. 400.)

[2] Words charging the commission of murder in Ireland are actionable without proving murder to be an indictable offense in that country. (Montgomery *v.* Deeley, 3 Wis. 709.) To charge one with administering poison in a foreign country, with intent to kill, is actionable, *semble* the court will presume such an offense to be indictable. (See Langdon *v.* Young, 33 Vt. 136.)

[3] Van Ankin, *v.* Westfall, 14 Johns. 233; and see Stout *v.* Wood, 1 Blackf. 71; Dufrasne *v.* Weise, 46 Wis. 290.

[4] 1 Starkie on Slander, 21, and he proceeds to establish this proposition by referring to the cases in which it has been decided that to say that a man is "forsworn," or has "taken a false oath," is not actionable unless the charge connects it with some judicial proceeding. Without this connection, he says, the charge only imputes a breach of morality, for which no action lies. (See Perjury, *post.*) Besides the older authorities, there is cited Hopkins *v.* Beedle, 1 Cai. 347; Stafford *v.* Green, 1 Johns. 505; Ward *v.* Clark, 2 *Id.* 10; Watson *v.* Hampton, 2 Bibb (Ky.), 319; Jacobs *v.* Fyler, 3 Hill, 572. To these we add Hopwood *v.* Thorn, 8 C. B. 293; Brite *v.* Gill, 2 T. B. Monr. 65; Dorsey *v.* Whipps, 8 Gill, 457; Holt *v.* Scholefield, 6 T. R. 694; Wyant *v.* Smith, 5 Blackf. 293; Tebbetts *v.* Goding, 9 Gray (75 Mass.), 254; Edgerly *v.* Swain, 32 N. H. 478; Wright *v.* Lindsay, 20 Ala. 428; Barham *v.* Nethersall, Yelv. 22; and see Heard on Libel, § 28. A charge of having "broken open and read a letter," sent by mail, held not actionable, because the offense, although indictable, is not, morally speaking, a crime. (Hillhouse *v.* Peck, 2 Stew. & Port. 395; and see McCuen *v.* Ludlum, 2 Harr. [N. J. Law], 12; Cheadle *v.* Buell, 6 Ham. 67; *post*, note to § 178, and *ante*, p. 164, note 2.)

Where the words on their face

which the following named offenses were not indictable, it was held not actionable *per se* to charge a breach of trust,[1] or a malicious trespass,[2] or of burning, destroying, and suppressing a will,[3] or attempting to procure, or causing or procuring a miscarriage,[4] or with incest,[5] or adultery,[6] or crime against nature,[7] or with cheating,[8] or "mismarking" cattle,[9] or living by imposture.[10]

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charge a criminal offense, but are shown by their context or otherwise, not to have that meaning, they are not actionable; thus the words, they are highwaymen, robbers, and murderers, being shown to relate to a transaction not amounting to a criminal offense, were held not to be actionable. (Van Rensselaer *v.* Dole, 1 Johns. Cas. 279; and see § 134 and note to § 137, *ante*, and Curvel *v.* McLeod, 4 All. 332 [New Brunswick].)

It has been held that a charge by a married woman of having stolen her goods is not actionable (she having no separate estate), as a married woman could not have goods of her own. (1 Rolle Abr. 74; 6 Bac. Abr. 238; 1 Starkie on Slander, 77.) But where a married woman said, my turkeys are stolen, Charnel has stolen them, it was held Charnel might have his action. (Charnel's Case, Cro. Eliz. 279.) And so where a married woman said, thou hast stolen my faggots. (Stamp *v.* White, Palmer, 358; and see Powell *v.* Plunket, Cro. Car. 52.)

As it is not a crime to buy intoxicating liquors from one illegally selling the same, it is not actionable *per se* to charge that one thus bought liquor. (Sterling *v.* Jugenheimer, 69 Iowa, 210.) So words charging grain dealers with combining to reduce the price of grain were held not to charge a crime and were not actionable *per se*. (Achorn *v.* Piper, 66 Iowa, 694.)

By the statute of Illinois, no child under the age of ten years can be punished for larceny; but an action may be sustained by such child for slanderous words accusing her of theft. (Stewart *v.* Howe, 17 Ill. 71; and see Redway *v.* Gray, 31 Vt. [2 Shaw], 292; Dukes *v.* Clark, 2 Blackf. [Ind.] 20; Bash *v.* Sommer, 20 Penn. St. [8 Harris], 159; see notes, pp. 123, 124 and note 12, p. 149 and § 144, subd. *b. b. ante*.)

In Wisconsin held actionable to call one a hog. (Solverson *v.* Peterson, 25 No. West. Rep. 14.)

[1] M'Clurg *v.* Ross, 5 Binn, 218.

[2] Wilcox *v.* Edwards, 5 Blackf. 183.

[3] O'Hanlon *v.* Myers, 10 Rich. Law [S. C.], 128; and see 3 Salk. 327. Charge of stealing a will actionable in New York. (Colyer *v.* Colyer, 50 Hun, 422.)

[4] Not within the exceptions of the statute. (Bissell *v.* Cornell, 24 Wend. 354; Abrams *v.* Foshee, 3 Clarke, 274; Smith *v.* Gaffard, 31 Ga. 45.) And held not actionable to charge an attempt to commit a robbery. (Russell *v.* Wilson, 7 B. Mon. 261.)

[5] Eure *v.* Odom, 2 Hawks (N. C.), 52; and as to charge of incest, see Starr *v.* Gardner, 6 Up. Can. Q. B. Rep. O. S. 512; Watts *v.* Greenlee, 2 Dev. 115; Gallwey *v.* Marshall, 9 Exch. 294; *ante*, § 141.

[6] Wagaman *v.* Byers, 17 Md. 183; Castleberry *v.* Kelly, 26 Ga. 606; see *ante*, § 144; subd. *a*, and *post*.

[7] Coburn *v.* Harwood, Minor, 93; Estes *v.* Carter, 10 Iowa, 400; and see *ante*, §§ 144, 153, and *post*. Where a crime against nature is indictable, to charge the commission of it is actionable. (Goodrich *v.* Woolcot, 3 Cow. 231; 5 Cow. 714.)

[8] Odiorne *v.* Bacon, 6 Cush. 185; Richardson *v.* Allen, 2 Chit. 657; Weirback *v.* Trone, 2 Watts & Serg. 408. Thou hast cheated me of several pounds, held actionable. (Surman *v.* Shelleto, 3 Burr. 1688.)

[9] Williams *v.* Karnes, 4 Humph. 9; Johnston *v.* Morrow, 9 Port. (18 Ala. O. S.) 525.

[10] Wilby *v.* Elston, 18 Law Jour.

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words were held actionable.
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Tettal *v.* Osborne, cited in Stoner
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(Cro. Eliz. 308.)
Crofts *v.* Brown, 3 Bulst. 167.
Bray *v.* Andrews, Moore, 63;
56.
Sidman *v.* Mayo, 3 Bulst. 261.
Horne *v.* Powell, Salk. 697.

a charge of treasonable intention has there been held to be actionable; thus, for saying, "He is a Jacobite, and for bringing in the Prince of Wales and popery to the destroying of our nation," held an action could be maintained.[1]

§ 162. It has been said the cases are uniform on the point that for an imputation of evil *inclinations* or *principles* no action lies, unless it affects the plaintiff in some particular character, or produces special damage.[2] But unless by *inclinations* and *principles* are meant *intentions* (§ 161), or the assertion be limited to oral language, the dictum seems to be unwarranted. It was held actionable to publish in writing that plaintiff had openly avowed the opinion that government had no more right to provide by law for the support of the worship of the Supreme Being than for the support of the worship of the Devil;[3] or that plaintiff would put his name to anything that T. would request him to sign, that would prejudice D.'s character;[4] and the words, "He would rob the mail for one hundred dollars," spoken of a postmaster, were held actionable.[5]

§ 163. It is held, in some cases, that words which denote *the opinion* or *the suspicion* entertained by the publisher, are not equivalent to a direct charge, and therefore are not actionable;[6] thus, where the words were, "I

[1] Prinn *v.* Howe, 1 Bro. Parl. Cas. 64; and see Eaton *v.* Allen, 4 Co. 16.

[2] 1 Starkie on Slander, 24; Harrison *v.* Stratton, 4 Esp. 218.

[3] Stow *v.* Converse, 3 Conn. 325.

[4] Duncan *v.* Brown, 15 B. Mon. 186.

[5] Craig *v.* Brown, 5 Blackf. 44; see § 197, *post*.

[6] Words which denote opinion or suspicion are not actionable. (Comyn's Dig. Act. for Defam. F, 13; cited in Hodgson *v.* Scarlett, 1 B. & Ald. 233: and see Simmons *v.* Mitchell, 6 App. Cas. 156; Dickson *v.* Phillips, 51 Sup. Ct. N. Y. [19 J. & S.] 162.) "What is the difference between suspicion and belief? Suspicion may rest on no grounds, belief rests upon some grounds." (Byles, J., Leet *v.* Hart, Law Rep. 3 C. P. 824.) "The stereotyped formulas of slander, 'they say,' 'it is said,' 'it is generally believed,' are about as effectual modes of blasting reputation as distinctly and directly to charge the crime." (Johnson *v.* St. Louis Dispatch Co. 65 Mo. 541.)

have a suspicion that you, B., have robbed my house, and therefore I take you into custody," it was held the judge rightly directed the jury that if they believed the defendant meant to impute only a suspicion of felony, and not an absolute charge of felony, their verdict must be for the defendant.[1] The words, "she ought to have been transported," were held not actionable, because they expressed only *the opinion* of the speaker.[2] But the words, He ought to be hanged as much as A., who was in fact hanged, were construed to charge an offense which deserved hanging, and actionable;[3] and it was held actionable to say of one, If you had your deserts, you had been hanged before now;[4] and so of the words, He hath deserved his ears to be nailed to the pillory,[5] but not actionable to say: Thou deservest to be hanged;[6] or, Thou shouldst have sat on the pillory if thou hadst thy deserts;[7] or, Thou has done that for which thou deservest to be hanged.[8] But the words, You have done things with the company for which you ought to be hanged, and I will have you hanged before the first of August, were held actionable;[9] and so of the words, "I know enough he has done to send him to the penitentiary."[10] It was held not to be actionable to say of one, "He is a great rogue, and deserves to be hanged as

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[1] Tozer *v.* Mashford, 4 Eng. L. & Eq. R. 451; 6 Exch. 539; 20 Law Jour. Rep. (N. S.) Ex. 224.

[2] Hancock *v.* Winter, 7 Taunt. 205. The words, I will transport him for felony, were held actionable. (Tempest *v.* Chambers, 1 Stark. Cas. 67.)

[3] Read *v.* Ambridge, 6 Car. & P. 308; and see Davis *v.* Noak, 1 Stark. Rep. 377; Johnson *v.* Brown, 57 Barb. 118.

[4] Donne's Case, Cro. Eliz. 62.

[5] Jenkinson *v.* Mayne, Cro. Eliz. 384.

[6] Heake *v.* Moulton, Yelv. 90.

[7] Anon. Moore, 243.

[8] Fisher *v.* Atkinson, Vin. Abr. Act. for Words, G, *a*, 5.

[9] On the ground that they imputed the commission of a crime punishable by hanging. (Francis *v.* Roose, 3 M. & W. 191.) "I will have him transported for perjury and forgery," with special damage, held actionable. (Floyd *v.* Jones, 2 Barnard. 101.)

[10] Johnson *v.* Shields, 1 Dutcher. 116. A general charge of having been guilty of crime, without naming the particular crime, seems sufficient. (Curtis *v.* Curtis, 4 Moo. & S. 337.) But held not sufficient to say he had been guilty of conduct unfit for publication, (James *v.* Brook, 10 Jur. 541.) Note 1, page 166, *ante*.

well as Gale," who was condemned to be hanged. Because the words show opinion merely, and perhaps the speaker might not think Gale deserved hanging.[1] It was held not actionable to say, I will take him to Bow street (a police office so called) on a charge of forgery.[2] It was held actionable for one to say he supposed the plaintiff was guilty of a crime;[3] or, I *think* he is a horse stealer.[4] It seems no more than the expression of an opinion to say, "Two dyers have gone off, and for ought I know, Harrison will be so too within this time twelve month." Yet these words were held to be actionable;[5] so of the words, "All is not well with Daniel Vivian; there are many merchants who have lately failed, and I expect no otherwise of Daniel Vivian;"[6] and so of the words, "I am thoroughly convinced you are guilty of the death of D. D."[7] But held not actionable to express a supposition or belief that one went to a certain place for the purpose of persuading another to commit adultery with him.[8]

§ 164. One may charge another with the commission of an offense as well by way of a question as by a direct assertion,[9] as "Is H. the man who broke jail?"[10] "What

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[1] Bush *v.* Smith, 2 Jones, 157.

[2] Harrison *v.* King, 4 Price, 46; 7 Taunt. 431.

[3] Dickey *v.* Andros, 32 Vt. 55.

[4] Stich *v.* Wisedome, Cro. Eliz. 348. If a man says he believes another committed a certain offense, his belief, although sincere, is no justification. (Kerr *v.* Force, 3 Cranch C. C. 8.)

[5] Harrison *v.* Thornborough, 10 Mod. 11.

[6] Vivian's Case, 3 Salk. 326.

[7] Peake *v.* Oldham, Cowper, 275; 2 W. Black. 960.

[8] Dickey *v.* Andros, 32 Vt. 55; and as to a charge of inciting one to commit a crime, see Passie *v.* Mondford, Cro. Eliz. 747; Cockaine *v.* Witnam, Cro. Eliz. 49; Eaton *v.* Allon, 4 Cow. 16. The dicta and decisions that words denoting *opinion* are not actionable, must have their origin in the *supposed* distinction between matters of fact and matters of opinion. See this distinction discussed in a case of misrepresentation (Haight *v.* Hayt, 19 N. Y. 468), in an essay on the influence of authority in matters of opinion by George Cornewall Lewis, and in the review of that work, Edinburgh Review, April, 1850; and in Whateley's Logic; Domat's Civil Law, note to § 1962; and see the distinction noticed, Root *v.* King, 7 Cow. 629; Reg. *v.* Ardley, Law Rep. 1 Cro. Cas. Res. 304.

[9] Gorham *v.* Ives, 2 Wend. 534; Sawyer *v* Eifert, 2 Nott. & M.' 511.

[10] Hotchkiss *v.* Oliphant, 2 Hill, 510.

will you bring home
m I. S. ?" [2] "Have you
Wilt thou murder my
"Who stole the bell-
whether the witness did
g, and asserting that he
said it was in G.'s hand-
tent to impress a belief

es it was held that "ad-
adjectively," do not con-
well said by Lord Coke,
ain an action, and some-
t actionable to call one
us villain," [9] or "pocky
but held actionable to
a "traitor knave." [13] We
when the word imputes
t imputes an intention
able.[14] Thus it has been
"thievish knave," or to
taken my money," be-
shly implies an inclina-
ving rogue was held ac-

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2 Ld. Raym. 236. So "murder-
uean" held not actionable. (Vin.
Act. for Words, I, *a*, 4.)
Gulford's Case, 2 Rolle R. 71;
"pocky rascal," see Vin. Abr.
or Words, G, *b*, 5.
Ward *v.* Thorne, Cro. Eliz. 171;
n *v.* Leach, Lev. 90.
Id.
Shelby *v.* Carryer, 2 Bulst. 210.
1 Starkie on Slander, 71, and
ante.
Vin. Abr. Act. for Words I, *a*,
Robins *v.* Hildredon, Cro. Jac.

tionable, because *thieving* implies an act.[1] "Thieving puppy" was held actionable,[2] and so were "thievish pirate," [3] "bankrupt knave," "pocky knave,"[4] and "bankrupt scrub."[5] "Bankrupt rogue" was held not actionable when spoken of an individual as such;[6] but those words, when spoken of one in trade (a shoemaker), were held actionable.[7] "Bankrupt knave" was said not to be actionable, because the phrase implies only bankrupt-like knave.[8] And so "Cuckoldy rogue" was held actionable.[9] A participle, it is said, implies an act done, and therefore held actionable to call one a "murdering rogue."[10] or a "buggering rogue,"[11] or to say he is robbing or ravishing.[12]

§ 166. Words charging a burning amounting to *arson*, whether at common law or by statute, are actionable;[13] thus

[1] Hunt *v.* Merrychurch, 2 Keb. 440; Dorrell *v.* Grove, Freem. 279.

[2] Little *v.* Barlow, 26 Ga. 423; and see *post*, § 169.

[3] Vin. Abr. Act for Words, I, *a*, 12.

[4] Inglebath *v.* Jones, Cro. Eliz. 99; but it was doubted in Robinson *v.* Mellor (Cro. Eliz. 843), if "bankrupt knave" was actionable, and the phrase was held not actionable when spoken of a tanner. (York *v.* Cecil, Brownl. 16.) The words "base, beggarly, bankrupt knave," were held actionable in Stile *v.* Finch (Cro. Car. 381); and so of the words "bribing knave," spoken of an attorney. (Yardly *v.* Elliss, Hob. 8*a*.)

[5] Wilson *v* Crow, Sty. 75.

[6] Loyd *v.* Pearse, Cro. Jac. 424.

[7] Langley *v.* Colson, Godb. 151.

[8] Selby *v.* Carrier, Cro. Jac. 345; but said otherwise, Booth *v.* Leach, Lev. 90. See Vin. Abr. Act. for Words, I, *a*, 3.

[9] The words were spoken in London, and held actionable as implying his wife was a whore. (1 Str. 471.)

[10] Green *v.* Lincoln, Cro. Car. 318.

[11] Collier *v.* Bourn, 2 Keb. 377; or "perjured knave" (Staverton *v.* Relfe, Yelv. 160); or "perjured rogue" (Orton *v.* Fuller, Lev. 65); but where the words were: "Thou art a perjured knave, that is to be proved by a stake that parts the lands of J. S. and J. D.," it was doubted if they were actionable. (Brecheley *v.* Atkins, Yelv. 10.)

[12] Sybthorp's Case, 1 Rolle Abr. 176; 1 Starkie on Slander, 72.

[13] Brady *v.* Wilson, 4 Hawks (N. Car.) 93; Case *v.* Buckley, 15 Wend. 327; Jones *v.* Hungerford, 4 Gill & Johns. 402; House *v.* House, 5 Har. & Johns. 124; Wallace *v.* Young, 5 B. Monr. 155. Saying, "He [plaintiff] has been at different times close about where C.'s gin-house was burned, in disguise," held not to amount to a charge of arson, and not actionable. (Waters *v.* Jones, 3 Port. 442.) The willful burning of an insured building, with intent to injure the insurer, is, by statutes of Wisconsin and Vermont, a felony. Where the complaint alleged that defendant knew plaintiff's hop-house was insured, and nevertheless charged him with setting fire to it, there being no evidence of defendant's knowledge, plaintiff was nonsuited. (Frank *v.* Dunning, 38 Wis. 270.) In absence of any statute, such a charge would not be actionable. (Redway *v.* Gray, 31 Vt. 292; and see Chace *v.* Sherman, 119 Mass. 387.) Plaintiff

charging one with burning his own store,[1] or the barn of another, is not actionable.[2] But to charge one with burning his own store to defraud the insurers would be actionable.[3]

§ 167. A general charge of *forgery* made orally is actionable;[4] and so to charge, "You are a rogue, for you forged my name,"[5] or "you signed my name without my permission."[6] But held not actionable to say, "Thou hast forged my hand," or "thou art a forger."[7] The writing charged to have been forged must, it seems, be one which, if genuine, would operate as the foundation of another's liability.[8] It has been held actionable to charge the forg-

owned a building in A. It was insured, and accidentally burned. Defendant said of plaintiff: "He is capable of anything. When the lightning struck K.'s house, how slow it went to the premises of A.; but he had them insured in three companies. He is the meanest man that ever lived. If he had lived in some counties, he would have been hung long ago." Held actionable. (Weil *v.* Schmidt, 28 Wis. 138.) See *ante*, § 144, subd. *c*.

[1] Bloss *v.* Toby, 2 Pick. 320; McNab *v.* McGrath, 5 Up. Can. Q. B. Rep. O. S. 516; or a building belonging to the wife of plaintiff, but occupied by plaintiff. (Redway *v.* Gray, 31 Vt. 292.) "He has burnt my barn," not actionable; it cannot, by innuendo merely, be extended to a barn with corn. (Barham's Case, 4 Coke, 20; Yelv. 21.)

[2] Barham *v.* Nethershall, Yelv. 22; Bundy *v.* Hart, 46 Mo. 460. Charging one with burning a school-house was held actionable (Wallace *v.* Young, 5 B. Monr. 155); and so of a gin-house. (Waters *v.* Jones, 3 Port. 442.)

[3] 1 Am. Lead. Cas. 3d ed. 117; and see Tebbets *v.* Goding, 9 Gray (75 Mass.), 254; Brettun *v.* Anthony, 103 Mass. 37; West *v.* Hanrahan, 28 Minn. 385; *contra*, Redway *v.* Gray, 31 Vt. 292.

[4] Alexander *v.* Alexander, 9 Wend. 141; Andrews *v.* Woodmansee, 15 Wend. 232; Nicols *v.* Hayes, 13 Conn. 155; Arnold *v.* Cost, 3 Gill & Johns. 219. "Thou hast forged a *deed* or bond," actionable; but "thou hast forged a writing," not actionable (Motley *v.* Slany, Keb. 273; Austie *v.* Mason, Cro. Eliz. 554; Reynell *v.* Sackfield, 2 Bulst. 132; Aier *v.* Frost, Rolle R. 431; S. C. Frost *v.* Ayer, 3 Bulst. 265; Andrews *v.* Bird, Het. 31), unless with an innuendo, a deed. (Anon. Sid. 16; and see Goodale *v.* Castle, Cro. Eliz. 554.) "You have falsely forged your father's hand, and thereby falsely have procured your father's tenants to pay rents to you which were due to your sister," held not actionable. (Vennard *v.* Wotton, Cro. Eliz. 166.) Charging forgery of a testimonial of a patent medicine, not actionable. (Miller *v.* Rittinger, 2 Pearson [Pa.], 351.) See *ante*, § 144, subd. *k*.

[5] Jones *v.* Herne, 2 Wils. 87.

[6] Creelman *v.* Marks, 7 Blackf. 281.

[7] Vin. Abr. Act. for Words, G, *a*, 20.

[8] Jackson *v.* Weisiger, 2 B. Monr. 214. "You say you were authorized by P. to draw bills on him. You never were authorized; if you have any letters from him, they are forged." These words held not actionable. (Mills *v.* Taylor, 3 Bibb, 469.)

ery of a deposition,[1] a warrant,[2] a petition to the Legislature for a grant of land;[3] and so of a letter containing these words: "I have to inform you I have received your money, and want you to come and receive it."[4]

§ 168. A general charge of being a murderer,[5] or of having killed another, is actionable,[6] Thus held actionable to say, "Thou hast killed a man;"[7] "You killed my brother;"[8] "You killed one negro and nearly killed another;"[9] "George Button is the man who killed my husband;"[10] "I will call him in question for poisoning his own aunt, and make no doubt but to prove he hath poisoned his aunt;"[11] and the words, "He killed my child;

[1] Atkinson *v.* Reding, 5 Blackf. 39; or forging writs. (Hungerford *v.* Watts, 4 Lev. 181; Sale *v.* Marsh, Cro. Eliz. 178; *contra*, Halley *v.* Stanton, Cro. Car. 268.)

[2] Stone *v.* Smalcombe, Cro. Jac. 648; Thomas *v.* Axworth, Hob. 2.

[3] Alexander *v.* Alexander, 9 Wend. 141.

[4] Ricks *v.* Cooper, 3 Hawks (N. Car.), 587. See § 144, subd. *k*, *ante*.

[5] Dudley *v.* Robinson, 2 Ired. 141; Noeninger *v.* Voght, 88 Mo. 589. Vin. Abr. Act. for Words, G. *a*, 11; *ante*, § 144, subd. *m*, *s*; but the words, "Thou art a murderer and a bloody fellow, and I am afraid of you," were held not actionable. (*Id.* 25.) To call one murderer because he killed a dog, not actionable; (*dictum*, Waggoner *v.* Richmond, Wright [Ohio], 173; see note p. 110, and note 2, p. 136, *ante*); and the words, "They are highwaymen, robbers, and murderers," appearing to be spoken in reference to a transaction not involving robbery or murder, were held not actionable. (Van Rensselaer *v.* Dole, 1 Johns. Cas. 279.)

[6] Johnson *v.* Robertson, 4 Port. 486; Chandler *v.* Holloway, *Id.* 18. It need not be alleged the party charged to have been killed is in fact dead. (Carroll *v.* White, 33 Barb. 618; see *ante*, notes 2, p. 125, and 2, p. 170, and § 144, subd. *m*, *s*.)

[7] Cooper *v.* Smith, Cro. Jac. 423; Banfield *v.* Lincoln, Freem. 278.

[8] Taylor *v.* Casey, Minor, 258. "Thou art a rogue and rascal, and hast killed thy wife," held actionable. (Wilner *v.* Hold, Cro. Car. 489)

[9] Hays *v.* Hays, 1 Humph. 402.

[10] Button *v.* Heyward, 8 Mod. 24. Held actionable to say, "Thou didst poison thy husband." (Gardiner *v.* Spurdant, Cro. Jac. 438); or, "T. [plaintiff] killed thy husband" (Toose Case, Cro. Jac. 306); or, "Thou hast killed a man" (Godfrey *v.* More, Cro. Eliz. 317); or, "Thou hast killed my wife" (Talbot Case, Cro. Eliz. 823); or, "Thou hast killed thy wife" (Wilner *v.* Hold, Cro. Car. 489).

[11] Web *v.* Poor, Cro. Eliz. 569. See *ante*, § 144. subd. *x*. Not actionable to say, "It could be proved by many violent presumptions that he [plaintiff] was the death of P." (Weblin *v.* Mayer, Yelv. 153); or, "I doubt not but to see thee hanged for killing Mr. Sydman's man who was murdered." (Anon. Jenk. 302.) It was held actionable to say, "Thou hast murdered A., thy late servant." If A. is not dead, or if there were no such person, the scandal is the greater (Green *v.* Warner, 3 Keb. 624); or, "Thou didst kill thy master's cook." (Cooper *v.* Smith, Cro. Jac. 423; and see Barrons *v.* Ball, *Id.* 331.)

it was the saline injection that did it," with an innuendo that it was meant to charge the plaintiff with feloniously killing a child by improperly and with gross negligence and culpable want of caution administering the injection.[1]

§ 169. A general charge of being a thief[2] is actionable, as to call one "A hog thief,"[3] "A bloody thief."[4] It is actionable to say of one, "He is a thieving person, he stole and ran away;"[5] or, "He is a thief, he stole my wheat and ground it and sold the flour to the Indians;"[6] or, "He is a thief; you have robbed me of my bricks."[7] The charge is not the less actionable because made indirectly.[8] Thus it was held actionable to say, "Tell him [plaintiff] he is riding a stolen horse, and has a stolen watch in his pocket;"[9] or, "I saw him take corn from A.'s crib twice, and look round to see if any person saw

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[1] Edsall *v.* Russell, 5 Scott N. R. 801; 2 Dowl. N. S. 614; 4 Man. & G. 1090; and see Carroll *v.* White, 33 Barb. 615, and *ante*, § 144. The words, "That knave Davis, the apothecary, hath poisoned my uncle; I will have him digged up again, and hang him," held actionable. (Davis *v.* Ockham, Sty. 245.)

[2] Dudley *v.* Robinson, 2 Ired. 141; and see *ante*, note 2, p. 177; or of having been a thief, *ante*, note 5, p. 168; and see § 144, subd. *p*, *r*, *z*, *bb*, *dd*, *ee*. "You are no thief," held to be ironical and actionable. (Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539.)

[3] Hogg *v.* Wilson, 1 Nott & McC. (So. Car.) 216; Porter *v.* Choen, 60 Ind. 338.

[4] Fisher *v.* Rotereau, 2 McCord (So. Car.), 189.

[5] Alley *v.* Neely, 5 Blackf. 200; Reynolds *v.* Ross, 42 Ind. 387; and see *ante*, note 5, p. 158.

[6] Parker *v.* Lewis, 2 G. Greene (Iowa), 311.

[7] Slowman *v.* Dutton, 10 Bing. 402; 4 M. & Sc. 174. "Thou art a thief, and hast stolen twenty loads of my furze," held not actionable. (Clarke *v.* Gilbert, Hob. 331.) As to furze, the presumption is it is attached to the soil; as to bricks, the presumption is they are chattels. "Ayres is a thief and hath stolen my apple trees," actionable. (Ayres' Case, 2 Brownl. 280.)

[8] McKennon *v.* Greer, 2 Watts (Pa.), 352; Mayson *v.* Sheppard, 12 Rich. Law (So. Car.), 254. "I believe he will steal and I believe he did steal," amount to a charge of larceny. (Dottarer *v.* Bushey, 16 Penn. St. R. 204; and *ante*, § 144, subd. *bb*.) The wife of B. was asked by C., "Wherefore will your husband hang S.?" She answered, "For breaking our house in the night and stealing our goods." Held actionable, although spoken in answer to a question. (Hayward *v.* Naylor, 1 Rolle Abr. 50.) So publishing in writing, that certain property had been stolen and the thief was believed to be plaintiff, held actionable. (Simmons *v.* Holster, 13 Minn. 249.)

[9] Davis *v.* Johnston, 2 Bailey, 579.

him measuring;"[1] or, "You get your living by sneaking about when other people are asleep. What did you do with the sheep you killed? Did you eat it? It was like the beef you got the negroes to bring you at night. Where did you get the little wild shoats you always have in your pen? You are an infernal roguish rascal;"[2] or, "There is the man who stole my horse and fetched him home this morning."[3] A charge by one partner against his copartner of "pilfering" out of the store, held actionable;[4] and held actionable to say of one, "He *took* my wood, and is guilty of any and everything that is dishonest;"[5] or, "He robbed the United States mail;"[6] and it is actionable to charge one having the custody of goods with stealing them;[7] but held not actionable to charge a weaver with stealing filling sent to his house to be woven into cloth.[8]

§ 170. A charge of larceny, that is, the taking *animo furandi* the personal property of another, *the subject of larceny*,[9] is actionable;[10] thus the words, "You have stolen

[1] Jones *v.* M'Dowell, 4 Bibb, 188.

[2] Morgan *v.* Livingston, 2 Rich. 573.

[3] Bonner *v.* Boyd, 3 Har. & J. 278.

[4] Beckett *v.* Sterrett, 4 Blackf. 499. Pilfering held not actionable. (Charter *v.* Hunter, Cro. Eliz. 424.) Actionable to say, "She is as very a thief or a worse thief than any that robbeth by the highway." (Ratcliff *v.* Shubley, Cro. Eliz. 224). Defendant said of plaintiff, his partner, "He is a thief. When I came down town this morning, my bookkeeper reported to me that he had gutted the drawer." "He has scuttled a ship to get the insurance," actionable. (McGibbon v. Young, 20 Wkly. Dig. 12.)

[5] Dottarer *v.* Bushey, 16 Penn. St. Rep. 204.

[6] Jones *v.* Chapman, 5 Blackf. 88.

[7] Gill *v.* Brite, 6 B. Mon. 130.

[8] Hawn *v.* Smith, 4 B. Mon. 385; but see *ante*, in note, p. 124, and § 144. To charge one with stealing cotton held actionable, although the charge was made in allusion to cotton which the plaintiff had to gin for the defendant's brother (Stokes *v.* Stuckey, 1 McCord, 562); and so of charging a dressmaker with appropriating material of her customer (Bowe *v.* Rogers, 50 Wis. 598); and as an overseer of an estate may be guilty of stealing the goods of his employer intrusted to him, it was held actionable to charge an overseer with stealing corn of his employer. (Wheatley *v.* Wallace, 3 Har. & J. 1.)

[9] Lee *v.* Dudd, Mo. App. 2 West. 465.

[10] Galloway *v.* Courtney, 10 Rich. 414; Blanchard *v.* Fisk, 2 N. H. 398; Bonner *v.* Boyd, 3 Har. & Johns. 278; Wheatley *v.* Wallis, 3 *Id.* 1; Stokes *v.* Stuckey, 1 McCord, 562; Gill *v.* Brite, 6 B. Mon. 130; Gaul *v.* Fleming, 10 Ind. 253; and see *ante*, § 144, subd. *p*, *z*, *bb*, *dd*, *ee*, and note 4,

my belt,"[1] or "my boards,"[2] or "my tea,"[3] were held actionable. And so of the words, "You robbed me, for I found the thing you done it with;"[4] or, "You robbed W."[5] "For some months back I have missed things from my laundry, Jennie (the plaintiff) has stolen them, and I have come to search your house;"[6] or, he "stole and destroyed my sister's will;"[7] the words, "He robbed the treasury and bought a farm with it,"[8] or "Bear witness he hath stolen my cloth," held not actionable.[9] Charging plaintiff with having stolen a barrel of pork, may or may not be actionable, according to the circumstances of the publication;[10] but *semble* to render them non-actionable it must appear that the facts could not in any view amount to a felony.[11] Where the words were, "I have lost a calf-skin

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p. 170. A charge of taking clothes, *animo furandi*, from a dead body, held actionable. (Wonson *v.* Sayward, 13 Pick. 402.)

[1] St. Martin *v.* Desnoyer, 1 Minn. 156; and so of the words, "Thou hast stolen my goods, and I will have thy neck." (Fleming *v.* Jales, 2 Brownl. 280.)

[2] Burbank *v.* Horn, 39 Md. 233.

[3] Coleman *v.* Playsted, 36 Barb. 26.

[4] Rowcliffe *v.* Edmonds, 7 M. & W. 12.

[5] Tomlinson *v.* Brittlebank, 1 Nev. & M. 455; 4 B. & Adol. 630. "Thou hast robbed the church, and thou hast stolen the lead off from the church," held actionable. (Benson *v.* Morley, Cro. Jac. 153.) And so of the words, "He hath robbed the church." (Sibthorp's Case, W. Jones, 366.)

[6] Bell *v.* Fernald, 38 No. West. Rep. (Mich.) 910.

[7] Collyer *v.* Collyer, 21 N. Y. St. Rep. 118.

[8] Allen *v.* Hillman, 12 Pick. 101; and see in § 144, subd. *s*.

[9] Bury *v.* Wright, Yelv. 126.

[10] Phillips *v.* Barber, 7 Wend. 439; and see § 144. "You [plaintiff] have stolen a file of bills out of my desk," with an innuendo that by file of bills was intended a file of unsatisfied accounts, held not actionable. (Blanchard *v.* Fisk, 2 N. Hamp. 398.) Defendant stated to several persons that plaintiff had robbed her, but these persons knew there had been a law suit between the parties, and testified that they did not understand defendant to charge plaintiff with a crime, held not actionable. (Bannon *v.* Cleary, 25 Wkly. Dig. 439.)

[11] Laine *v.* Wells, 7 Wend. 175; Alexander *v.* Alexander, 9 *Id.* 141; Case *v.* Buckley, 15 *Id.* 327. B. spoke of A., that A. and B. and one C. sat down to gamble in a house in D., and while there C. took from his pocket-book a five dollar bill and proposed to bet one dollar; that after the bill was put down on a chance it was missing, and search was made for it but it could not be found, whereupon the parties agreed to submit to a search, which was made, but the bill was not found; that after this search, all the parties went out of the house to search for the missing bill; near the window they found a pocket-book with the clasp unfastened, and in it was the missing bill; that C. took out the bill and handed the pocket-book to A., who took it,

out of my cellar. . . . There was no one in the cellar but you, Bornman and Gray. I do not blame you nor Gray, but Bornman must have taken it," they were held actionable.[1] Charging one with stealing a key out of the lock of a door, held actionable.[2] By the laws of Pennsylvania, taking and carrying away fruits, vegetables, &c., whether attached to the soil or not, is a misdemeanor, yet where the words were, "Mrs. Reynolds has stolen corn out of Gubbles' field," "He was confident Pat. Reynolds' wife stole Gubbles' corn," held the words were not actionable, if they referred to growing corn.[3] To charge plaintiff with having wrongfully taken defendant's logs, sawing them up, and selling the lumber, is actionable without averring that larceny was intended.[4] "He sheared two of

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and then said, "Boys, don't tell this on me, for if you do it will ruin me." *Held* that these words did not of themselves import a charge of larceny. (Prichard *v.* Lloyd, 2 Ind. 154.)

[1] Bornman *v.* Boyer, 3 Binn. 515; *ante*, § 144, subd. *dd*, and see Keesling *v.* McCall, 36 Ind. 321.

[2] Hoskins *v.* Tarrence, 5 Blackf. 417. This decision was on the hypothesis that stealing a key out of the lock of a door is larceny. It was so held in Rex *v.* Hedges, 1 Leach's C. C. 201, 4th ed., but is said to be "clearly wrong." Heard on Libel, p. 37, note 4. Actionable to say: "You never thought well of me since G. [plaintiff] did steal my lamb" (Grave's Case, Cro. Eliz. 289); or, "I dealt not so unkindly by you [plaintiff] when you stole a sack of corn." (Cooper *v.* Hawkeswell, 2 Mod. 58.) "J. W. [plainfiff] was in question for stealing a mare, and hue and cry went out after him, and he durst not show his face hereabouts," doubtful if actionable. (Gray *v.* Wayle, Sty. 159.) A. said to B. [the defendant], "My sheep were feloniously stolen away." B. replied, "I know who *took* them; it was J. S." Held actionable. (Helly *v.* Hender, 3 Bulst. 83.) "Go follow suit against W. [the plaintiff] for stealing thy two kine, and hang him," held actionable. ("Willymote *v.* Wetton, Cro. Eliz. 904.) So were the words, "He is infected of the robbery and murder lately committed, and doth smell of the murder." (Hawley *v.* Sidenham, Vin. Abr. Act. for Words, P, *a*, 14.) "You might have known your own sheep and not have stolen mine," court divided if actionable or not. (Tompson *v.* Knott, Yelv. 144.) "Thou [plaintiff] hast stole my mare or was consenting to it," held not actionable; the plaintiff might consent and yet be faultless, and the latter part of the sentence controlled the first. (Anon. Noy, 172.) "S. [plaintiff] did steal a mare, or else G. is forsworn," not actionable, not being a direct charge of stealing. (Sparham *v.* Pye, Cro. Jac. 532.) So the words, "You as good as stole the canoe of J. H.," were held not actionable *per se*. (Stokes *v.* Arey, 8 Jones L. [N. Car.] 66.)

[3] Stitzell *v.* Reynolds, 9 P. F. Smith, 488; and see Hall *v.* Adkins, 59 Mo. 144. By statute in New York taking soil is a criminal offense. (Penal Code, § 640, subd. 4.)

[4] Connick *v.* Wilson, 2 Kerr (New Bruns.) 496.

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bbery of a store belong-
as copartners.[2]

jury is actionable *per se*,[3]
"The Reverend Thomas
e perjured himself,"[5] or
caring in his vote at the
here the defendant, speak-
dit made by the plaintiff,
had perjured himself, it

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attorney general's directions to
secute the plaintiff for perjury, held
onable after verdict for plaintiff.
berts *v.* Camden, 9 East, 93.) And
ng, "I would not swear to what
W. has for the town of R.; P. W.
honestly mistaken, but C. W. is
ful," imputes perjury to C. W.,
is actionable. (Walrath *v.* Nellis,
How. Pr. R. 72; see *ante*, § 144,
d. *u.*) A charge of subornation
erjury is actionable (Cro. Jac. 158;
rs *v.* Strong, Kirby, 12), as "You
caused this boy to perjure him-
" (Brownl. 2).
Cummin *v.* Smith, 2 S. & R. 440.
e swears that, he swears to a lie,
not actionable, because hypothe-
d. (Lang *v.* Gilbert, 4 Allen [New
ns.], 445.)
Sanford *v.* Gaddis, 13 Ill. 329. I
prove thee a perjured knave, ac-
able. (Staverton *v.* Relfe, Yelv.
.) O. [plaintiff] says I am a per-
ed rogue; he is a perjured rogue
ell as I—held actionable. (Orton
Fuller, Lev. 65.) If I list I can
ve him perjured—held not to im-
e perjury, and therefore not action-
e. (Davis' Case, Hutt. 127.)
Crawford *v.* Wilson, 4 Barb. 504;
ll *v.* Clewley, 60 Maine, 262.

was held to be actionable if the intent was to impute perjury.[1] The words, "he swore a false oath," or "he swore a lie," or "he swore false," are not actionable *per se*, nor can an action be maintained for them merely by an innuendo that they imputed or were intended to impute perjury. There must be an averment and *colloquium* of a *judicial* proceedings.[2] To say of one, You are a liar; you swore to a lie; you get your living that way—held not to be actionable *per se*.[3] To say of one, he is "mainsworn," was held

[1] Cook *v.* Bostwick, 12 Wend. 48. The words, "he has delivered false evidence and untruths in his answer to a bill in chancery," held not actionable. (1 Rolle Abr. 70; 3 Inst. 167.) Where the allegation was "we have no reply to make to a lad [plaintiff] convicted of perjury, by the solemn oath of a gentleman whose veracity is unimpeached," and the context showed that, by convicted it was really meant that the plaintiff was contradicted by the gentleman referred to, held error to instruct the jury that the charge, "convicted of perjury," was actionable, *per se*, as such instruction implied that the charge was of technical perjury. (Pugh *v.* McCarty, 40 Ga. 444.)

[2] Packer *v.* Spangler, 2 Binn. (Pa.) 60; Sheely *v.* Biggs, 2 Har. & J. 363; Power *v.* Miller, 2 McCord, 220; Martin *v.* Melton, 4 Bibb (Ky.), 99; Sluder *v.* Wilson, 10 Ired. 92; Beswick *v.* Chappel, 8 B. Mon. 486; Roella *v.* Follow, 7 Blackf. 377; Vaughan *v.* Havens, 8 Johns. 109; Chapman *v.* Smith, 13 Johns. 78; Hopkins *v.* Beedle, 1 Cai. T. R. 347; Phincle *v.* Vaughan, 12 Barb. 215; Barger *v.* Barger, 18 Penn. State Rep. 489; Blair *v.* Sharp, Breese, 11; McManus *v.* Jackson, 28 Miss. (7 Jones), 56; Watson *v.* Hampton, 2 Bibb, 319; Shinloub *v.* Ammerman, 7 Ind. 347; Mebane *v.* Sellars, 3 Jones' Law (N. Car.) 199; Harris *v.* Woody, 9 Miss. 113; Horn *v.* Foster, 19 Ark. 346; Harvey *v.* Boies, 1 Penn. (Penr. & W.) 12; Dalrymple *v.* Lofton, 2 Speers (So. C.), 588; Shaffer *v.* Kintzer, 2 Binn. (Pa.) 537; Hall *v.* Montgomery, 8 Ala. 510; Walrath *v.* Nellis, 17 How. Pr. R. 72; Ward *v.* Clark, 2 Johns. 10; Stafford *v.* Grier, 1 Johns. 505; Lea *v.* Robertson, 1 Stew. (Ala.) 138; but see Rue *v.* Mitchell, 2 Dall. 58; Canterbury *v.* Hill, 4 Stew. & Porter, 224; Smale *v.* Hammon, 1 Bulst. 40: Lewis *v.* Soule, 3 Mich. 514; Hall *v.* Weedon, 8 Dowl. & R. 140; Colomes' Case, Cro. Jac. 204; Hutts *v.* Hutts, 62 Ind. 214; Casselman *v.* Winship, 3 Dak. 292; Stewart *v.* Wilson, 23 Minn. 449. "Mr. H.'s oath is not to be taken, for he has been a forsworn man. I can bring people to prove it, and they that know him will not sit in the jury-box with him." Without any *colloquium*, referring the words to the conduct of the plaintiff as a juryman, and no special damage, held not in themselves actionable, and judgment arrested. (Hall *v.* Weedon, 8 D. & R. 140.) You swore to a lie in that suit we had at Liberty, held actionable *per se*. (Spooner *v.* Keeler, 51 N. Y. 527.) "Stanhope hath but one manor, and that he got by swearing and forswearing." (Stanhope *v.* Blith, 4 Co. 15.) In Arkansas, by statute, to charge a person with having sworn falsely or sworn a lie, is actionable, without an averment or proof of special damage, or a *colloquium*. (Carlock *v.* Spencer, 2 Eng. (Ark.) 12; McGough *v.* Rhodes, 7 *Id.* 625.) And so in Mississippi, (Crawford *v.* Mellton, 12 S. & M. 328; see *ante*, § 153.)

[3] Kimmis *v.* Stiles, 44 Vt. 351; Small *v.* Clewley, 60 Maine, 262. The words, "You dirty stinking liar, you got on the stand and swore false oaths against me," are actionable *per se*,

actionable when spoken at a place where mainsworn meant perjured.[1] A charge of being forsworn is not actionable *per se*; it imports only "false swearing," and not "perjury." But a charge of "false swearing," may convey to the minds of the hearers an imputation of perjury, and when it does, such a charge is actionable *per se*:[2] as, where, after a charge of false swearing, the defendant added, "I will attend to the grand jury about it;"[3] or, "If you had your deserts, you would have been dealt with in the time of it;"[4] or, "For which you would now stand indicted"[5] or, "to my injury $600;"[6] or, "and done it meaning to cut my throat;"[7] or, "and I will put him through for it, if it costs me all I am worth."[8] And held actionable to say of any one, "Thou art a forsworn man. I will teach thee the price of an oath, and will set thee on the pillory;"[9] or, "You swore a lie, and I can prove it," used in reference to a judicial proceeding in which the plaintiff had testified as a witness;[10] or, under similar circumstances, the words, "He swore a lie."[11] Where the charge is of false swear-

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provided "stand" means witness stand in a judicial proceeding. (Padgett *v.* Sweeting, 4 Atl. Rep. 887.) But to say of one that he is a man of bad character in the neighbourhood in which he lives as regards truth and veracity, and that the speaker would not believe him on oath is not actionable *per se*. (Studdard *v.* Trucks, 31 Ark. 726.)

[1] Hob. 12.

[2] Sherwood *v.* Chace, 11 Wend. 38; Crookshank *v.* Gray, 20 Johns. 344; McClaughry *v.* Wetmore, 6 Johns. 82; Jacobs *v.* Fyler, 3 Hill, 572; Coons *v.* Robinson, 3 Barb. 625; Morgan *v.* Livingston, 2 Rich. 573; Hillhouse *v.* Dunning, 6 Conn. 391; Gabe *v.* McGinness, 68 Ind. 538. Defendant said, Thou art a *forsworn* fellow; plaintiff answered, Will you say that I am perjured? defendant said, Yes, if you will have it so—held not actionable. (Levermore *v.* Martin, Cro. Eliz. 297.)

[3] Gilman *v.* Lowell, 8 Wend. 573.

[4] Phincle *v.* Vaughan, 12 Barb. 215.

[5] Pelton *v.* Ward, 3 Cai. 73. "You have been indicted before the grand jury for false swearing," held actionable *per se*. (Brace *v.* Brink, 33 Mich. 91.)

[6] Jacobs *v.* Fyler, 3 Hill, 572.

[7] Coons *v.* Robinson, 3 Barb. 625.

[8] Crone *v.* Angell, 14 Mich. 340.

[9] 1 Starkie on Slander, 91.

[10] Lewis *v.* Black, 27 Mass. (5 Cush.) 425; Rhinehardt *v.* Potts, 7 Ired. Law (N. Car.) 403; Rainey *v.* Thornbury, 7 B. Mon. 475; Sherwood *v.* Chace, 11 Wend. 38.

[11] Harris *v.* Purdy, 1 Stew. 231; and see Wilson *v.* Harding, 2 Blackf. 241; Gibbs *v.* Tucker, 2 A. K. Marsh, 219; and 6 T. R. 691; Grace *v.* Brink, 33 Mich. 91; Mitchell *v.* Mulholland, 106 Ill. 105.

ing before a particular court or tribunal, or in a particular proceeding, naming it, the charge is actionable, if the court or tribunal named is one authorized to administer an oath, or if the proceeding named is a judicial proceeding; thus, it has been held actionable to say of one, he swore false before the grand jury;[1] or, "Thou art a forsworn knave, and I will prove thee to be forsworn in the spiritual court;"[2] or, "Thou wast forsworn before my Lord Chief Justice in evidence;"[3] or "before a justice of the peace,"[4] or, "in Illston Court," a court leet so named;[5] or, "I had a lawsuit with A., and B. [the plaintiff] swore falsely against me, and I have advertised him as such;"[6] or, "You swore false at the trial of your brother John."[7] Held not actionable to say of one, "Thou wert forsworn at Whitechurch court;"[8] or "Thou art a false and forsworn knave, and that I will prove, for thou forswore thyself against Peter Rumball in the hundred court."[9] An arbitration or a proceeding *de lunatico inquirendo* is a judicial proceeding, and false swearing in such a proceeding is perjury; therefore, to charge false swearing in such a proceeding is actionable;[10] but perjury cannot be predicated of evidence in

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[1] Perselly *v.* Bacon, 20 Mo. 330.

[2] Shaw *v.* Thompson, Cro. Eliz. 609; and see Rex *v.* Foster, Russ. & R. Cr. Cas. Resv. 439; Stat. 40 Geo. IV, ch. 76. False swearing before an ecclesiastical tribunal is not perjury in Pennsylvania. (Harvey *v.* Boies, 1 Penn. [Penr. & W.] 12; *contra*, in Connecticut, Chapman *v.* Gillet, 2 Conn. 40.)

[3] Lev. 127; Starkie on Slander, 90.

[4] Gurneth *v.* Derry, 3 Lev. 166; 4 Coke, 17.

[5] Marshall *v.* Dean, Cro. Eliz. 720.

[6] Magee *v.* Stark, 1 Humph. 506. The words, I had a lawsuit, imply a judicial proceeding. (*Id.*)

[7] Fowle *v.* Robbins, 12 Mass. 498. The words were held actionable after verdict (and see Cro. Car. 378); but the words, You swore falsely on the trial of a case between me and A., before Squire J., were held not actionable. (Dalrymple *v.* Lofton, 2 Speers (So. Car.) 588.)

[8] Cro. Car. 378. Because it did not appear that Whitechurch court was a court of record, and for the same reason the words, "Thou hast forsworn thyself in Leet court," were held not actionable. (1 Rolle Abr. 39; 6 Bac. Abr. 207; see Dalton *v.* Higgins, 34 Ga. 433.) But the words, "A. C. is a forsworn man, and hath taken a false oath in his deposition at Tiverton, where he waged his law against me," were held actionable, because the forswearing appeared to amount to perjury. (Cro. Jac. 204.)

[9] Core *v.* Morton, Yelv. 28. So ruled after verdict.

[10] Moore *v.* Horner, 4 Sneed, 491; Rouse *v.* Ross, 1 Wend. 475; Bullock

a controversy relative to pre-emption rights before the registers, &c., of the land office, and therefore a charge of false swearing in such a controversy is not actionable.[1] Ordinarily words are actionable which imply in their customary import that a false oath has been taken in a judicial proceeding,[2] as, you swore false in court,[3] and this, although the proceeding referred to never had any existence.[4] Saying of one, he swore to a damned lie, but I am not liable, because I have not said in what suit he testified, was held not actionable.[5] To say to a witness, whilst giving his testimony on a trial in court, "that is a lie;"[6] or, "I believe you swear false. It is false what you say;"[7] or, "You have sworn a manifest lie,"[8] is actionable.[9]

Swearing falsely as to immaterial matter does not amount to perjury, and therefore to charge false swearing as respects matter which is immaterial to the issue involved, cannot, in any event or under any circumstances, be actionable;[10] thus, saying of one that on a certain trial he

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v. Koon, 9 Cow. 30; Hutts *v.* Hutts, 62 Ind. 214; and see Sanford *v.* Gaddis. 13 Ill. 329.

[1] Hall *v.* Montgomery, 8 Ala. 510. *Held* not actionable to charge a voter with swearing falsely at an election for alderman for the city of Toronto. (Thomas *v.* Platt, 1 Up. Can. Q. B. 217.) Where the imputation was that plaintiff had taken a false oath, but not in a judicial proceeding, the plaintiff had a verdict for £2 10*s.* damages. The court refused a new trial, but arrested the judgment, the words not being actionable. (Hogle *v.* Hogle, 16 Up. Can. Q. B. 518.)

[2] Cass *v.* Anderson, 33 Vt. 182.

[3] Hamilton *v.* Dent, 1 Hayw. (N. Car.) 116; see *ante*, note 7, p. 187.

[4] Bricker *v.* Potts, 12 Penn. St. R. 200; Henry *v.* Hamilton, 7 Blackf. 506. And though an affidavit for a warrant be insufficient to justify the granting of it, an action may be maintained for imputing perjury in making the affidavit, if any fact set forth in it be material to the application. (Dayton *v.* Rockwell, 11 Wend. 140; and see Bell *v.* Farnsworth, 11 Humph. 608.) Slander will lie on an accusation of perjury in a criminal cause, although the complaint therein was too defective for an irreversible judgment (Wood *v.* Southwick, 97 Mass. 354).

[5] Muchler *v.* Mulhollen, Supp. to Hill & Denio's Rep. 263.

[6] Mower *v.* Watson, 11 Vt. 536. Probably not actionable to say, "He swore to a lie if he swore as Jones says he did." (Evarts *v.* Smith, 19 Mich. 55; see § 224, *post.*)

[7] Cole *v.* Grant, 3 Harr. (N. J.) 327.

[8] Kean *v.* M'Laughlin, 2 S. & R. 469; McClaughry *v.* Wetmore, 6 Johns. 82; *contra*, Bagley *v.* Hedges, 1 Penn. (N. J.) 233; Spooner *v.* Keeler, 51 N. Y. 527.

[9] As to publishing comments on witnesses, see § 256*a*, *post.*

[10] Horn *v.* Foster, 19 Ark. 346; Darling *v.* Banks, 14 Ill. 47; Wilson *v.* Oliphant, Wright, 153; Crookshank *v.* Gray, 20 Johns. 344; Rouse *v.* Ross,

testified to what was false, that the matter so testified to was immaterial, but that he, the party testifying, showed great disregard for the truth, was held not actionable.[1] The test of materiality is not whether the witness believes the testimony to be material, but whether, if false, he can be indicted for perjury. If the testimony is in fact immaterial, it cannot be perjury, though it may be false, and whatever may be the opinion of the witness.[2] Another essential element of perjury is, that the oath alleged to have been broken was administered by competent authority, and therefore to charge the breach of an oath not administered by competent authority would not be actionable.[3] (§§ 321, 322).

§ 172. Ordinarily, and in the absence of any statutory provision (§ 153), words published orally charging a woman with want of chastity are not actionable *per se*;[4]

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1 Wend. 475; Dayton *v.* Rockwell, 11 Wend. 140; Power *v.* Price, 12 Wend. 500; S. C. 16 Wend. 450; Roberts *v.* Champlin, 14 Wend. 120; Wilson *v.* Cloud, 2 Speers (So. C.), 1; Owen *v.* McKean, 14 Ill. 459; M'Gough *v.* Rhodes, 7 Eng. (Ark.) 625.

[1] Stone *v.* Clark, 21 Pick. 51; and see M'Kinley *v.* Rob, 20 Johns. 351; Smith *v.* Smith, 8 Ired. 29; Wilson *v.* Cloud, 2 Speers (So. Car.), 1.

[2] Rouse *v.* Ross, 1 Wend. 475. Perjury may be alleged in swearing to a promise within the statute of frauds, and therefore a charge of false swearing as to such a promise may be actionable. (Howard *v.* Sexton, 4 N. Y. 157.)

[3] Jones *v.* Marrs, 11 Humph. 214; Dalton *v.* Higgins, 34 Ga. 433; Burkett *v.* McCarty, 10 Bush (Ky.), 758; and see Van Steenbergh *v.* Kortz, 10 Johns. 167; Niven *v.* Munn, 13 Johns. 48; Cro. Car. 378; 1 Rolle Abr. 39.

[4] 1 Starkie on Slander, 28; Byron *v.* Elmes, 2 Salk. 693; Berry *v.* Carter, 4 Stew. & Port. 387; Eliot *v.* Ailsberry, 2 Bibb, 473; Keiler *v.* Lessford, 2 Cr. C. C. 190; Ranger *v.* Goodrich, 17 Wis. 78; Rodgers *v.* Lacey, 23 Ind. 507; Pettibone *v.* Simpson, 66 Barb. 493; Shafer *v.* Ahalt, 48 Md. 71; *contra*, in Connecticut (Frisbie *v.* Fowler, 2 Conn. 707), in Kentucky, since the statute of 1811 (McGee *v.* Wilson, Litt. Sel. Cas. 187; Smalley *v.* Anderson, 2 T. B. Mon. 56), in Illinois (Spencer *v.* M'Masters, 16 Ill. 405), in Missouri (Moberly *v.* Preston, 8 Mo. 462; Steiber *v.* Wensel, 19 Mo. 513), in New Jersey (Heming *v.* Elliott, 5 Cent. Rep. 592), in California, (Nidiver *v.* Hall, 67 Cal. 80), in Ohio, (Malone *v.* Stewart, 15 Ohio, 319; Wilson *v.* Robbins, Wright, 40; Wilson *v.* Runyon, *Id.* 651; Sexton *v.* Todd, *Id.* 317), in Maryland (Terry *v.* Bright, 4 Md. 430), in Alabama (Sidgreaves *v.* Myatt, 22 Ala. 617; but see Berry *v.* Carter, 4 Stew. & Port. 387), in Indiana (Shields *v.* Cunningham, 1 Blackf. 86; Worth *v.* Butler, 7 *Id.* 251; Rodeburg *v.* Hollingsworth, 6 Ind. 339; Rodgers *v.* Lacey, 23 Ind. 507; Linck *v.* Kelley, 25 Ind. 278; Blickenstaff *v.* Perrin, 27 Ind. 527), in North Carolina (McBrayer *v.* Hill, 4 Ired. 136; Snow *v.* Witcher, 9 *Id.* 346), in

ondon and borough of
call a woman a whore,[1]
te,[2] or to charge an un-
a bastard,[3] or to call a

held actionable to call one "A
who held a copyhold *dum casta
it.*" (Boys *v.* Boys, Sid. 214.)
eld not actionable to say to or of
man, "You are a whore, and keep
to lie with you." (Gascoigne *v.*
er, 2 Ld. Raym. 1004); or, "She
hore, and had a bastard by her
's apprentice." (Graves *v.* Blan-
3 Salk. 696; and see Anon. *Id.*
Calling a woman "whorish
," actionable in Alabama. (Scott
cKinnish, 15 Ala. 662.) To call
man a strumpet is not equivalent
alling her a whore. (Williams
Bryant, 4 Ala. 44; *contra*,
v. Wingfield, 1 Stra. 555.) By
om in the city of Bristol, it is ac-
ble to call a woman strumpet.
ver *v.* Shaw, 1 Wills. 62.) See in
post. You come round here to
den by men actionable. (Rhodes
nderson, 12 Cent. Rep. 727.)
Brooker *v.* Coffin, 5 Johns. 188;
y *v.* Elston, 8 C. B. 142; 7 Dowl.
143; 1 Starkie on Slander, 28;
a of a married woman, Klewin *v.*
nan, 10 No. West. Rep. 398. See
§ 144, subd. *y*.
Vin. Abr. Act. for Words D, *a*,
3; Graves *v.* Blanchet, 3 Salk.
n note 1, *supra*; and saying to a
ied woman, "Thou bold Cola-
s, bastard-bearing whore, thou
throw thy bastard into the dock,"
Whitechapel, held not actionable.
byn *v.* Viner, W. Jones, 356.)
aying of a woman, "She had a
and either she or somebody else
away with it," was held not ac-
ble. (Falkner *v.* Cooper, Carth.
"She had a child while at Mrs.
wood's," spoken of an unmarried
man, not actionable. (McQueen *v.*
am, 27 Texas, 463.) In Ohio,
actionable to charge a woman
having had a bastard by the man
afterwards married. (Murray *v.*
ay, 1 Cinc. [Ohio], 290.)

woman a bawd,[1] or to charge an unmarried woman with fornication,[2] or a married woman with adultery,[3] or a woman with being of a wanton and lascivious disposition,[4] or of being addicted to self-pollution,[5] or to say of a woman, "She was hired to swear the child on me; she has had a child before this, when she went to Canada; she would come damned near going to the State prison."[6] But it has been held actionable to say of a woman, she is a "loose woman,"[7] or to charge conduct amounting to open and gross lewdness,[8] or to say of a married woman, "She slept with one not her husband,"[9] or to charge an unmarried woman with being in the family-way,[10] and adding, "I can prove it by A. that she has been taking camphor and opium pills to produce an abortion;"[11] or, "She

[1] Cavel *v.* Birket, Sid. 438; *contra*, Hicks *v.* Hollingshead, Cro. Car. 261.

[2] Buys *v.* Gillespie, 2 Johns. 115; such a charge is actionable in Kentucky. (Smalley *v.* Anderson, 2 T. B. Mon. 56), in Ohio (Wilson *v.* Robbins, Wright, 40), in North Carolina (McBrayer *v.* Hill, 4 Ired. 136), in Indiana (Ricket *v.* Stanley, 6 Blackf. 169; Huddlestone *v.* Swope, 71 Ind. 430, and in New Jersey (Joralemon *v.* Pomeroy, 22 N. Jersey, 271.) Charging an unmarried woman with being "a bad character," and guilty of fornication, held actionable in Iowa. (Dailey *v.* Reynolds, 4 G. Greene, 354.) And see *ante*, § 144, subd. *l*, and *post*, note to § 173.

[3] Woodbury *v.* Thompson, 3 N. Hamp. 194; Stanfield *v.* Boyer, 6 Har. & J. 248; Griffin *v.* Moore, 43 Md. 246; *contra*, Miller *v.* Parish, 8 Pick. 384; and see Walton *v.* Singleton, 7 S. & R. 449. To charge a woman with fornication or adultery, or incontence in any form, is not actionable at common law. (Heard on Libel, p. 46, citing in addition to the cases already noted, Ayer *v.* Craven, 2 Adol. & L. 2; 4 Nev. & M. 220; Evans *v.* Gwyn, 5 Q. B. 844. And see Davies *v.* Solomon, Law Rep. 7 Q. B. 112.)

[4] Lucas *v.* Nichols, 7 Jones' Law (N. Car.) 32.

[5] Anon. 60 N. Y. 262.

[6] Brooker *v.* Coffin, 5 Johns. 188.

[7] Adcock *v.* Marsh, 8 Ired. Law (N. Car.) 360.

[8] Underhill *v.* Welton, 32 Vt. 40.

[9] Guard *v.* Risk, 11 Ind. 156; Barnett *v.* Ward, 36 Ohio St. 107; *contra*, Pollard *v.* Lyon, 1 Otto (91 U. S.) 225. Charging a married woman with taking men into her bedroom, with averments showing it was for adulterous purposes, held actionable. (Waugh *v.* Waugh, 47 Ind. 580.) Saying a woman is the paramour of a man, actionable. (McKenney *v.* Roberts, 8 Pac. Rep. 857.)

[10] Smith *v.* Minor, Coxe, 16; Miles *v.* Van Horn, 17 Ind. 245; *contra*, see Shepherd *v.* Wakeman, Sid. 79; Lev. 37. To say of a married woman she "*is in a fix*," meaning, by local usage, she is pregnant, is not actionable, but actionable if said of an unmarried woman. (Acker *v.* McCullough, 50 Ind. 447; and see Wilson *v.* Barnett. 45 Ind. 163.) And *ante*, note to p. 183.

[11] Miles *v.* Van Horn, 17 Ind. 245. "Its my soul's opinion that nothing else kept that girl in the house last winter but taking medicine to banish the young baker," innuendo that plaintiff had taken medicine to procure an abortion, held actionable. (Miller *v.*

had two or three little ones to A.;"[1] or, "Her child is A's, and A. was keeping her unmarried for his own purposes;"[2] or charging sexual intercourse with a dog[3] and where the defendant said of the plaintiff, that B. told him that on Sunday, at the camp-meeting, he scared the plaintiff and a man up from behind a log; that they broke and run, and that he (B.) got her (plaintiff's) parasol and handkerchief, held that these words were actionable;[4] but saying of a woman, "She went down the river to the *goose-house*," without averring any special meaning to goose-house, was held not actionable.[5] To say of a woman, "While she was there claiming to be the wife of F., she was here claiming to be my wife," is not an imputation of want of chastity and is not actionable *per se*.[6]

§ 173. The following words and phrases published orally of an individual as such, have been held actionable *per se*: Bogus pedler,[7] dealer in counterfeit money,[8] deserter,[9]

Houghton, 10 Up. Can. Q. B. R. 348.) And held actionable to say of a woman: "She procured or took medicines to kill the bastard child she was like to have, and she did kill or poison the bastard child she was like to have." (Widrig *v.* Oyer, 13 Johns. 124.) In slander, held that to charge a woman with causing or procuring an abortion upon herself was not charging her with an indictable offense, under the statute of Iowa, unless it appeared that the child was quick, and that an action could not be maintained upon such a charge. (Hatfield *v.* Gano, 15 Iowa [7 With.] 177.) Charge of administering pills to drive off a child, equivalent to a charge of abortion, and actionable. (Filber *v.* Dautermann, 25 Wis. 518, and see Reid *v.* State, 53 Ala. 402.)

[1] Symonds *v.* Carter, 32 N. Hamp. 458, and *ante*, note 3, p. 190; Beardsley *v.* Bridgman, 17 Iowa, 290.

[2] Richardson *v.* Roberts, 23 Ga. 215: Downing *v.* Wilson, 36 Ala. 717. She [plaintiff] is not chaste. I have kept her, and had criminal intercourse with her; or, "I have had sexual intercourse with her," held not actionable. (Berry *v.* Carter, 4 Stew. & Port. 387; *contra*, Adams *v.* Rankin, 1 Duval [Ky.], 58.) The words "I have lain with her and pockified her," held actionable. (Neale *v.* Mallard, 2 Show. 312.)

[3] Cleveland *v.* Detweiller, 18 Iowa, 299; and see *ante*, note 1, p. 124.

[4] Proctor *v.* Owens, 18 Ind. 21.

[5] Dyer *v.* Morris, 4 Mo. 214. As to words of a woman with allegation of special damage, see § 198, *post*.

[6] Pike *v.* Van Wormer, 6 How. Pr. R. 101; 5 *Id.* 175.

[7] Funk *v.* Beverly, 11 No. West. Rep. 227.

[8] Pike *v.* Van Wormer, 6 How. Pr. R. 99.

[9] Hollingsworth *v.* Shaw, 19 Ohio St. 430.

knave,[1] pickpocket,[2] sheepstealer,[3] traitor,[4] common barrator or champertor,[5] receiver of stolen goods,[6] counterfeiter.[7] I charge you with felony;[8] you are a rogue and I will prove you a rogue, for you forged my name;[9] concealing stolen goods,[10] purchasing stolen goods, knowing them to have been stolen.[11] Hog thief.[12] He is a rogue, and has stolen my sheep.[13] You have altered the marks of four of my hogs;[14] he killed a horse.[15] You have removed my landmarks; cursed is he that removeth a landmark.[16] She

[1] Knave imports dishonesty, and is actionable. (Harding *v.* Brooks, 5 Pick. 244; *contra*, see Week's Case, 1 Sid. 149; Latch, 159; and Monthly Law. Rep. Oct. 1862, p. 716.) Pillory knave held actionable (Browne *v.* Daukes, Cro. Eliz. 11); denied (Smith's Case, Cro. Eliz. 31). In the time of Henry VI, knave was a good addition to a man's name, and the term had not a defamatory meaning. There is said to be an edition of the New Testament which reads: Paul, a *knave* of Jesus Christ, instead of Paul, an *apostle*. (See Halliwell's Dict. of Archaic Terms.)

[2] Stebbing *v.* Warner, 11 Mod. 255; and see note 2, p. 151, *ante*.

[3] Parret *v.* Parret, 3 Bulst. 303; Vin. Abr. Act. for Words, I, *a*, 5.

[4] Dal. 17; Bellingham *v.* Mynors, Cro. Eliz. 133. "Thou hast spoken treason, and that I will prove;" "I will hang him, for he hath spoken treason," actionable. (Berisford *v.* Press, Cro. Jac. 275.) See Rebel.

[5] Vin. Abr. Act. for Words, H, *a*, 7; Heake *v.* Moulton, Yelv. 90; Box *v.* Barnaby, Hob. 117 *a*, but maintainer of suits is not actionable. (*Id.*) See *contra*, Portman *v.* Stowell, cited in Nicholas *v.* Badger, F. Moore, 428.

[6] Dias *v.* Short, 16 How. Pr. R. 322. To charge one with having received stolen goods is not actionable, unless the receiving was with a guilty knowledge (*Id.*; and Patterson *v.* Collins, 11 Up. Can. Q. B. R. 63. See Dorsey *v.* Whipps, 8 Gill, 457; Cox *v.* Humphries, Cro. Eliz. 877: Steventon *v.* Higgins, 2 Keb. 338; Dawes *v.* Bolton, Cro. Eliz. 888; see note 2, p. 130, *ante*.) Charge that plaintiff's house had been searched for stolen goods. State *v.* Smily, 37 Ohio St. 30.

[7] Howard *v.* Stephenson, 2 Rep. Cons. Ct. 408; Thirman *v.* Matthews, 1 Stew. (2 Ala.) 384. The law takes notice of the word counterfeit, as importing a felony. (Stone *v.* Smalcombe, Cro. Jac. 648.)

[8] Vin. Abr. Act. for Words G, *a*, 3; Jones, 32; Smith *v.* Hodgeskins, Cro. Car. 276; Poph. 210; Paine *v.* Prestny, Sty. 235.

[9] Jones *v.* Herne, 2 Wils. 87; and see Hurst *v.* Borbidge, 57 Penn. St. Rep. 62.

[10] Miller *v.* Miller, 8 Johns. 58; and see Newlyn *v.* Fasset, Yelv. 154.

[11] Alfred *v.* Farlow, 8 Adol. & El. N. S. 854; Mayo *v.* Sample, 18 Iowa, 306; Brigg's Case, Godb. 157; and see Dorsey *v.* Whipps, 8 Gill, 457.

[12] Cheatwood *v.* Mayo, 5 Munf. 16. Thief. (Sabin *v.* Angell, 46 Vt. 740.) He gets his living by thieving. (Rutherford *v.* Moore, 1 Cranch C. C. Rep. 388.)

[13] McAlexander *v.* Harris, 6 Munf. 465.

[14] Perdue *v.* Burnett, Minor, 138; *contra*, Williams *v.* Karnes, 4 Humph. 9; Johnston *v.* Morrow, 9 Porter, 525; Glines *v.* Smith, 48 N. H. 259.

[15] Gage *v.* Shelton, 3 Rich. 242. He cut my horse's throat is actionable. (Yearly *v.* Ashley, 4 Har. & J. 314.) He poisoned my cow, held actionable. Burton *v.* Burton, 3 G. Greene, 316); *contra* of he poisoned my horse. (Chaplin *v.* Cruikshanks, 2 Har. & J. 247.)

[16] Young *v.* Miller, 3 Hill, 21.

put poison in a barrel of drinking water to poison me.[1] You are a vagrant,[2] a corn-stealer,[3] concealer of felony,[4] aiding in a felony.[5] He is a rogue and villain; he has ruined many families, and the curses of widows and children are on him; he has wronged my father's estate, and cheated my brother.[6] She produced a false heir, or a bogus baby;[7] she *kept* a bawdy-house,[8] or she keeps a whore-house.[9] He makes his money easy; he keeps a gambling hell or a gambling place;[10] indecent exposure;[11] bribery to secure election;[12] breaking open a letter addressed to another, and taking out money and using the money so taken.[13] You have committed an act for which I can

[1] Mills *v.* Wimp, 10 B. Monr. 417

[2] Miles *v.* Oldfield, 4 Yeates, 423; see note 4, p. 197.

[3] Vin. Abr. Act. for Words, G, *a*. 24 Anon. Cro. Eliz. 563.

[4] Thou art a concealer of felony, and it lieth in my power to hang thee. (Vin. Abr. Act. for Words, G, *a*, 21; Yelv. 154.) M. hath stolen sheep, and Nicholas, by agreement, hath taken a meadow to help him to cloak and escape the felony, held actionable, although not alleged that Nicholas knew of the felony, for taking the meadow to cloak the felony implied he had notice of it. (Nicholas *v.* Badger, F. Moore, 428; and see Rich *v.* Holt, Cro. Jac. 268.)

[5] Words imputing to A. a felony by night, with the addition that when I [defendant] drove him off, I saw B. standing at the road holding a torch for him, A., held to impute felony in the second degree to B., and to give him a cause of action. (Hooper *v.* Martin, 54 Ga. 648.)

[6] Marshall *v.* Addison, 4 Har. & McHen. 537.

[7] Weed *v.* Bibbins, 32 Barb. 315.

[8] The offense, although past, is still punishable. (Newton *v.* Masters, 2 Lev. 233; Martin *v.* Stillwell, 13 Johns. 275; Vin. Abr. Act. for Words, H, *a*, 8; see *ante*, § 144, subd. *d*.) A charge of keeping a bawdy-house was held not actionable. (Anon. Cro. Eliz. 643.) See § 155, *ante*.

[9] Wright *v.* Paige, 36 Barb. 438; affi'd 3 Trans. App. 134; Brayne *v.* Cooper, 5 M. & W. 249; Huckle *v.* Reynolds, 7 C. B. N. S. 114; 8 C. B. 142; Parkins *v.* Scott, 1 Hurl. & C. 153; see *ante*, § 144, subd. *d*; § 155, and Savill *v.* Kirby, 10 Mod. 385. Those people upstairs keep a whore-house, held actionable *per se*. (Cook *v.* Rief, 52 Superior Co't [20 J. & S.], 302.) Charge of letting a house for a brothel, actionable. (Harley *v.* Gregg, 38 No. West. Rep. 416.)

[10] Buckley *v.* O'Niel, 113 Mass. 193.

[11] Torbit *v.* Clare, 8 Irish Law Rep. 86.

[12] Bendish *v.* Lindsey, 11 Mod. 194; Hoag *v.* Hatch, 23 Conn. 585; or to procure an appointment under the government. (Purdy *v.* Stacey, 5 Burr. 2698; see Lindsey *v.* Smith, 7 Johns. 359; Chipman *v.* Cook, 2 Tyler, 456.) Actionable to charge a member of a nominating convention of a political party with having been influenced by a bribe. (Hand *v.* Winton, 38 N. J. 122; and see Tillson *v.* Robbins, 68 Me. 295, and note to § 177. *post*.)

[13] Cheadle *v.* Buell, 6 Ham. (Ohio) 67; see McCuen *v.* Ludlum, 2 Harr. 12; Bell *v.* Thatcher, Freeman, 276; Hillhouse *v.* Peck, 2 Stew. & Port. 395.

transport you.[1] I know enough he has done to send him to the penitentiary.[2] I am thoroughly convinced that you are guilty (innuendo of the death of D.), and rather than you should go without a hangman I will hang you.[3] Fraudulently destroying a vote ;[4] signing a name to a note without authority ;[5] he has been excommunicated,[6] whoremonger,[7] fornication, when or where punishable by indictment.[8] He hath got M. N. with child.[9] He should [would] have been hanged for a rape, but it cost him all the money in his purse.[10] You will lie with a cow again as you did. If you had your deserts you deserve to be hanged.[11] You [plaintiff] are as great a rogue as your master, who is a rogue for that he stole rugs.[12] Adultery

[1] Curtis *v.* Curtis, 4 Mo. & Sc. 337; 10 Bing. 477.

[2] Johnson *v.* Shields, 1 Dutcher, 116.

[3] Peake *v.* Oldham, Cowp. 275; 2 W. Black. 960.

[4] Dodds *v.* Henry, 9 Mass. 262.

[5] Creelman *v.* Marks, 7 Blackf. 281.

[6] The defendant, a minister, pronounced in church that the plaintiff had been excommunicated, and refused to proceed with the service until plaintiff left the church, held actionable. (Barnabas *v.* Taunter, Vin. Abr. Act. for Words, D, *a*, 15,) and see *post*, note to § 241*b*.

[7] Vin. Abr. Act. for Words, D, *a*, 26; see note 12, p. 197, *post*.

[8] Anon. 2 Sid. 21; Joralemon *v.* Pomeroy, 22 N. J. 271; Page *v.* Merwin, 8 Atl. Rep. 675. Fornication, although it involves moral turpitude, is not indictable, and therefore not actionable; and held the words of a married woman, "I saw her in bed with Captain Denty," were not actionable without special damage. (Pollard *v.* Lyon. 1 Otto [91 U. S.], 225). In Kentucky, a man may maintain an action of slander for words charging him with having been guilty of fornication. (Morris *v.* Barkley. 1 Litt. 64; see also Phillips *v.* Wiley, 2 *Id.* 153); so in Indiana, under the statute of that tate (Rodgers *v.* Lacey, 23 Ind. 507); so in Pennsylvania, though he be a married man (Walton *v.* Singleton, 7 S. & R. 449); but not so in Ohio. (Wilson *v.* Robbins, Wright, 40; and see Dukes *v.* Clark, 2 Blackf. 20). And for such a charge a woman may maintain an action in Missouri. Indiana and New Hampshire. (Moberly *v.* Preston, 8 Mo. 462; Abshire *v.* Cline, 3 Ind. 115; Symons *v.* Carter, 32 N. H. 468; and see note 2, p. 191, *ante*.)

[9] Marsden *v.* Dennis, 2 Sid. 1657. Sir Edward Lentall lay with me, and had the use of my body *by force*, held actionable; the majority of the court being of opinion that the words *by force* imputed a rape. (Lentall's Case, Litt. Rep. 337; and see Taylor *v.* Tally, Palmer, 385, where a charge that T. *ravished* H.'s wife was held actionable.) The words, He had the use of my wife's body *by force*, with allegation of special damage that in consequence of the words plaintiff was arrested on a charge of rape, and put to expense in making his defense, held actionable. (Harris *v.* Smith, Vin. Abr. Act. for Words, D, *a*, 9.)

[10] Redfern *v.* Todd, Cro. Eliz. 589.

[11] Poturite *v.* Barrel, 1 Sid. 220.

[12] Upton *v.* Pinfold, Comyn's R. 267.

in certain States in which it is punishable as a crime.[1] Incontinence.[2]

§ 174. The following words and phrases published orally of an individual as such, have been held *not* actionable *per se*: Adulterer,[3] bawd,[4] bankrupt,[5] blackleg,[6] bushwhacker,[7] cheat,[8] common filcher,[9] companion of cutthroats,[10] deserter,[11] enchanter,[12] insolvent,[13] liar,[14] rogue,[15] arrant rogue,[16] damned rogue,[17] you are a rogue, and cheated J. S. out of £100,[18] sacrilege,[19] scoundrel,[20] sorcerer,[21] sod-

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[1] Stieber *v.* Wensel, 19 Mo. 513; Farnsworth *v.* Storrs, 5 Cush. 412; Ricket *v.* Stanley, 6 Blackf. 169; see *ante*, § 144, subd. *a*, and *infra*, note 3.

[2] Watts *v.* Greenlee, 2 Dev. 115; see *ante*, § 153, and *post*, § 195.

[3] Vin. Abr. Act. for Words, G, *a*, 12; D, *a*, 27. Charging a man with being intimate with a married woman does not imply adultery, and is not actionable. (Adams *v.* Stone, 131 Mass. 433; see §§ 153, 172, *ante*.) But a charge that a person at a time and place mentioned, met the wife of another, "and committed an abomination in the sight of the Lord," is not libelous *per se*. (People *v.* Isaacs, 1 N. Y. Crim. R. 148.)

[4] Vin. Abr. Act. for Words, H, *a*, 9.

[5] Vin. Abr. Act. for Words, H, *a*, 6.

[6] Barnett *v.* Allen, 3 Hurl. & Nor. 376.

[7] Curry *v.* Collins, 37 Mo. 324. The word "bushwhacker" is now in the Constitution of Missouri.

[8] Chase *v.* Whitlock, 3 Hill, 139; Stevenson *v.* Hayden, 2 Mass. 406; Lucas *v.* Flinn, 35 Iowa, 9. The words were, Cheat and swindle, you defrauded me. (See Vin. Abr. Act. for Words, G, *a*, and note 1, p. 199, *post*.)

[9] Vin. Abr. Act. for Words, G, *a*.

[10] Vin. Abr. Act. for Words, G, *a*.

[11] Hollingsworth *v.* Shaw, 19 Ohio St. 430.

[12] Vin. Abr. Act. for Words, H, *a*.

[13] Redway *v.* Gray, 31 Vt. 292.

[14] Smalley *v.* Anderson, 4 T. B. Monr. 367; King's Case, 4 Inst. 181; and see *ante*, § 144, subd. *q*.

[15] Artieta *v.* Artieta, 15 La. Ann. 48; Idol *v.* Jones, 2 Dev. 162; Quinn *v.* O'Gara, 2 E. D. Smith, 388; Black *v.* Hunt, 12 Ir. L. T. R. 24; distinguishing Kinahan *v.* McCullough, 11 *Id.* 45. "Your father was a horse-stealing rogue, and you [plaintiff] are a great rogue," not actionable. (Bellamy *v.* Barker, 1 Strange, 304.) Rogue, rascal, scoundrel, and the like, are not actionable. (1 Starkie on Slander, 24.) After verdict for plaintiff in an action for calling him "a rogue," the court refused to arrest the judgment (Borbridge *v.* Herst, 6 Phila. Rep. [Legal Intel. Cond.] 391; s. c. Herst *v.* Borbidge, 57 Penn. St. Rep. 62.)

[16] Vin. Abr. Act. for Words, G, *a*.

[17] Oakley *v.* Farrington, 1 Johns. Cas. 129; Caldwell *v.* Abbey, Hardin (Ky.), 529. God damned rogue, not actionable. (Ford *v.* Johnson, 21 Ga. 399.)

[18] Winter *v.* Sumvalt, 3 Har. & J. 38. Saying one was a rogue of record was held actionable. (Sty. 220.)

[19] Gaudie *v.* Smith, 1 Sid. 376.

[20] Quinn *v.* O'Gara, 2 E. D. Smith, 388.

[21] Vin. Abr. Act. for Words, H, *a*.

omite,[1] swindler,[2] libeler,[3] vagrant or vagabond,[4] rebel,[5] welcher,[6] negro,[7] free negro,[8] varlet,[9] villain,[10] witch,[11] whoremaster,[12] seducer of innocent girls,[13] bastard.[14] He is father of a bastard.[15] He cozened J. S. of one hundred marks.[16] He cozened the Earl of H. of as much as he [plaintiff] is worth.[17] You cozened me of £1,200 at one time.[18] Your master [plaintiff] is a cozening, cheating knave, and a

[1] Anon. 29 Up. Can. Q. B. R. 456; Melvin *v.* Weiant, 36 Ohio St. 184. Charging a woman with sodomy, actionable. (Haynes *v.* Ritchey, 30 Iowa, 76.)

[2] Chase *v.* Whitlock, 3 Hill, 139; Savile *v.* Jardine, 2 H. Black. 531; Odiorne *v.* Bacon 6 Cush. 185; Stevenson *v.* Hayden, 2 Mass. 406; Weil *v.* Altenhofen, 26 Wis. 708; Lucas *v.* Flinn, 35 Iowa, 9; Black *v.* Hunt, 3 Ir. L. R. 10 Q. B. D. Swindler and thief actionable. (Stern *v.* Katz, 38 Wis. 136.) To say of a bank director he is a swindler, held actionable. (Forrest *v.* Hanson, 1 Cranch C. C. Rep. 63.) To write of one he is a swindler, is actionable. (l'Anson *v.* Stuart, 1 T. R. 748; see notes 3, 4, p. 207, *post*.

[3] Andres *v.* Koppenheafer, 3 Serg. & R. 255; see § 177, *post*.

[4] Corcoran *v.* Corcoran, 7 Ir. L. R. N. S. 272; Campbell *v.* White, 5 *Id.* 312; but see Miles *v.* Oldfield, 4 Yeates, 423.

[5] Unless used in a treasonable sense. (Beardsley *v.* Dibblee, 1 Kerr [New Brunswick], 246.)

[6] To call one a "welcher," *i. e.*, one who receives money deposited to abide the result of a race, and who has a predetermined intention to keep the money and not part with it in any event, held not actionable. (Blackman *v.* Bryant, 27 Law Times, N. S. 491.)

[7] Toye *v.* McMahon, 21 La. Ann. 308; Sportono *v.* Fouricher, 4 So. Rep. 71.

[8] McDowell *v.* Bowles, 8 Jones Law (N. Car.), 184.

[9] Vin. Abr. Act. for Words, G, *a*.

[10] Vin. Abr. Act. for Words, G. *a*. Villain, rascal, cheater, not actiona ble (Nelson *v.* Borchenius, 52 Ill. 236.)

[11] Vin. Abr. Act. for Words, H. *a*. Witch and sorcerer were actionable whilst the statutes against witchcraft remained in force. (Rogers *v.* Gravat, Cro. Eliz. 571.) "Heretic" or "Papist," not actionable. (Vin. Abr. Act. for Words, D, *a*.)

[12] Witcher's Case, Keb. 119; Vin. Abr. Act for Words, D, *a*. *Contra*, when spoken of a married man. (Georgia *v.* Kipford, 45 Iowa, 48.) But actionable with special damage. (Matthew *v* Crass, Cro. Jac. 323; 2 Bulst. 89.)

[13] Finch *v.* Vifquain, 9 No. West. Rep. 43.

[14] Not actionable unless special damage. (Vin. Abr. Act. for Words, D, *a*, 16, 17, 18, 21, 22, 31; Nelson *v.* Staff, Cro. Jac. 422; Humphreys *v.* Stanfield, Cro. Car. 469; Hoar *v.* Ward, 47 Vt. 657.) But actionable if in writing. (Shelby *v.* Sun Print. Asso. 38 Hun, 474.) Calling the children of a married woman bastards does not give any right of action to either mother or children, unless there be appropriate allegations to show the words imputed a crime to the mother. (Hoar *v.* Ward, 47 Vt. 664. See § 177, *post*.)

[15] Unless the bastard is chargeable to the parish. (Salter *v.* Browne, Cro. Car. 436.)

[16] Somerstaile's Case, Goldsb. 125.

[17] Tut *v.* Kerton. 1 Bulst. 162.

[18] Townsend *v.* Barker, Sty. 388. Thou hast no more than thou hast got by cozening, not actionable. (Broomfield *v.* Snoke, 12 Mod. 307.) He swindled me out of $500, not actionable. (Weil *v.* Altenhofen, 26 Wis. 708.)

rogue to boot, and cozened and cheated all the parish and all persons he deals with.[1] Those two rascals [plaintiff and his brother] killed my hogs and converted them to their own use.[2] The library has been plundered by C. [the plaintiff].[3] He killed and salted one of my hogs.[4] He defrauded a meal man of a horse.[5] He robbed the treasury and bought a farm with it.[6] He embezzled goods.[7] He attempted to commit a robbery.[8] He passed counterfeit money.[9] He cut off the tail of my horse.[10] He harbored my negroes.[11] He whipped his wife,[12] or his mother.[13] He snaked his mother out of doors by the hair of her head, the day before she died.[14] He is a mulatto and akin to negroes.[15] He gave a free pass to a negro.[16] He [plaintiff] is a brabbler and a quarreler, for he gave his champion counsel to make a deed of gift of his goods, to kill me and then fly out of the country, but God preserved me.[17] His [plaintiff's] boys did frequently come to our house and hire our negroes and take the dogs and go down into the river bottom and killed cattle no more theirs than mine.[18] You cheated the lawyer of his linen, and stood bawd to your

[1] Tamlin *v.* Tamlin, Show. 181. "Thou art a cozening knave, and hast cozened thy master of a bushel of barley," spoken of a servant in husbandry, held actionable. (Seaman *v.* Bigg, Cro. Car. 480.) The misappropriation of funds by a trustee of public works being a misdemeanor, to charge such a misappropriation held actionable *per se*. (Decow *v.* Tait, 25 Up. Can. Rep. 188.)

[2] Sturgenegger *v.* Taylor, 2 Brevard, 480.

[3] Carter *v.* Andrews, 16 Pick. 1; and see Mackay *v.* Ford, 5 H. & N. 792.

[4] Clay *v.* Barkley, Ky. Dec. (Sneed) 67.

[5] Richardson *v.* Allen, 2 Chit. 654.

[6] Allen *v.* Hillman, 12 Pick. 101.

[7] Caldwell *v.* Abbey, Hard. 529; and see Williams *v.* Scott, 1 Cr. & M. 675; 3 Tyrw. 688.

[8] Russell *v.* Wilson, 7 B. Mon. 261.

[9] Church *v.* Bridgman, 6 Mo. 190.

[10] Gage *v.* Shelton, 3 Rich. 242.

[11] Croskeys *v.* O'Driscoll, 1 Bay, 481; Skinner *v.* White, 1 Dev. & Bat. 471.

[12] Birch *v.* Benton, 26 Miss. 153; Dudley *v.* Horn, 21 Ala. 379.

[13] Speaker *v.* McKenzie, 26 Mo. 255.

[14] Billings *v.* Wing, 7 Vt. 439.

[15] Barrett *v.* Jarvis, 1 Ham. 83, note. But such a charge was held actionable. (Eden *v.* Legare, 1 Bay, 171; Atkinson *v.* Hartley, 1 McCord, 203; King *v.* Wood, 1 N. & M. 184.) Yellow negro, villain and liar, not actionable. (Johnson *v.* Brown, 4 Cranch Cir. C. Rep. 235.)

[16] McManus *v.* Jackson, 28 Miss. 56.

[17] Eaton *v.* Allen, 4 Co. 16.

[18] Porter *v.* Hughey, 2 Bibb, 232.

daughter to make it up with him; you cheat everybody; you cheated me of a sheet; you cheated T. S., and I will let him know it.[1] She secreted one shilling under the till; and these are not times to be robbed.[2] She is an hermaphrodite.[3] He is a bloodsucker, and not worthy to live in a commonwealth, and his child, unborn, is bound to curse him.[4] Thy credit hath been called in question, and a jury being to pass upon it, thou foistedst on a jury early in the morning, and the lands thou hast are gotten by lewd practices.[5] Thou wast the cause that J. S. did hang himself, and that R. N. did cut his own throat, and thou beginnest with no man but thou undoest him;[6] drunkenness;[7] he got drunk on Christmas day.[8] "He killed her by his bad conduct, and I think he knows more

[1] Davis *v.* Miller, 2 Strange, 1169; and see note 8, p. 196, *ante*.

[2] Kelly *v.* Partington, 2 Nev. & M. 460.

[3] The words were spoken of one who taught dancing, and held not actionable, because men as well as women taught dancing. (Wetherhead *v.* Armitage, 2 Levinz. 233.) But in Ohio it has been held actionable to call a woman an hermaphrodite. (Malone *v.* Stewart, 15 Ohio, 319.)

[4] Thimmelthorp's Case, Noy, 64.

[5] Nichols *v.* Badger, Cro. Eliz. 348; see *ante*, § 144, subd. *j*.

[6] Anon. Dal. 89. See Kedrolivansky *v.* Niebaum, 11 Pac. Rep. 641.

[7] Buck *v.* Hersey, 31 Me. 558; O'Hanlon *v.* Myers, 10 Rich. Law (So. Car.), 128. But held actionable when charged against a preacher or settled minister (McMillen *v.* Birch, 1 Binn. 178; Chaddock *v.* Briggs, 13 Mass. 248; Hayner *v.* Cowden, 27 Ohio St. 292), or a female (Brown *v.* Nickerson, 5 Gray, 1), or a chief engineer of a fire department (Gottbehuet *v.* Hubachek, 36 Wis. 515), or a lawyer (Sanderson *v.* Caldwell, 45 N. Y. 398), or a master mariner in command of a vessel (Irwin *v.* Brandwood, 2 Hurl. & C. 960). There is a statute by which conviction of drunkenness deprives a master mariner of his certificate. The words, he will get drunk. I have seen him drunk, spoken of a clergyman, held not actionable. (Tighe *v.* Wicks, 33 Up. Can. Q. B. Rep. 479.) Saying of a schoolmaster, "He was drunk and fell on the floor," held not actionable *per se*, but there being an innuendo, meaning a man of intemperate habits, it was, after verdict for plaintiff, held that the words might impute habitual drunkard, and so be actionable. (Brandrick *v.* Johnson, 1 Vict. Law Rep. 306.)

[8] Warren *v.* Norman, Walker, 387. "May the Lord have mercy on two men who brought me to court yesterday, bringing shame and scandal on me. My curse and the curse of God be down on F." [plaintiff]. These words, spoken by a Roman Catholic priest during church service, held not actionable. (Fitzgerald *v.* Robinson, 112 Mass. 371.) But the words, "This P. S. [plaintiff] is excommunicated because he laid hands on a priest to put him out of church. I will not pray for him. If he die, the burial rights of the church shall be denied him," spoken by a priest of a member of his congregation, were, on demurrer, held actionable. (Servatius *v.* Pichel, 34 Wis. 292; *post*, note to § 241*b*.)

about her being drowned than anybody else;"[1] he adulterated sugar, cheated the government, and swore he did not do so.[2]

§ 175. With respect to a charge of having a disease, it is actionable to charge one with having the venereal disease,[3] or gonorrhœa,[4] or leprosy,[5] or *semble*, falling sickness,[6] but not the itch or small-pox,[7] or with being insane,[8] unless it affects him in his business.[9] To call one leprous knave was held actionable.[10] But it has been held not actionable to charge one with *having had* any of the diseases above indicated;[11] thus it was held not actionable to say of one, Thou art a base fellow and *hadst* [*or*, hast had] the French pox,[12] or to say of a woman, "I have kept her common these seven years, she hath given me the bad disorder, and three or four other gentlemen."[13] The reason assigned for these decisions is, that to charge the having such a disease is actionable because the disease, being contagious, the *having* it renders the person an improper member of society, but there is no reason why the com-

[1] Thomas *v.* Blaisdale, 18 No. East. Rep. 214. The words do not import murder.

[2] Havemeyer *v.* Fuller, 10 Abb. N. C. 9.

[3] Bloodworth *v.* Gray, 7 M. & G. 334; 8 Sc. N. S. 9; Golderman *v.* Stearns, 73 Mass. 181; Williams *v.* Holdridge, 22 Barb. 398; Hewit *v.* Mason, 24 How. Pr. R. 366; Vin. Abr. Act. for Words, D, *a*, 56; H, *a*, 3, 4, 5, 9; U, *a*, 15; Nichols *v.* Guy, 2 Carter, 82; Kaucher *v.* Blinn, 29 Ohio St. 62. "I will tell you what is the matter with her, she has had the pox," held actionable because the words import that plaintiff was still then suffering from said disease. (Irons *v.* Field, 9 R. I. 216.)

[4] Watson *v.* McCarthy, 2 Kelly, 57; Williams *v.* Holdredge, 22 Barb. 398.

[5] *Id.*

[6] Spoken of a lawyer. (Taylor *v.* Perkins, Noy, 117.)

[7] See Villers *v.* Monsley, 2 Wils. 403, and notes 3, p. 121, *ante*, and note 12, p. 208, *post*.

[8] Joannes *v.* Burt, 6 Allen (Mass.), 236. The charge was made orally.

[9] Morgan *v.* Lingen, 8 Law Times, N. S. 800. The charge of insanity was in writing and held actionable.

[10] Taylor *v.* Perkins, Cro. Jac. 144.

[11] Carslake *v.* Mapeldoram, 2 T. R. 474; Bloodworth *v.* Gray, 7 M. & G. 334. 8 Sc. N. S. 9; Pike *v.* Van Wormer, 5 How. Pr. R. 171.

[12] Smith's Case, Noy, 157; Dutton *v.* Eaton, All. 31. But in Miller's Case (Cro. Jac. 430), the words Mrs. Miller is a whore, and *hath had* the pox, were held actionable. So were the words, "She went to the spa to be cured of the French pox." The words imply she had that disease. (Hobson *v.* Hudson, Sty. 199.)

[13] Carslake *v.* Mapeldoram, 2 T. R. 474.

pany of a person who *has had* a contagious disease should be avoided; and therefore, to say one *has had* such a disease is not actionable.[1] A distinction is taken between having had a disease and having been guilty of a crime, the stain of which remains.[2] These decisions assume that it is the fact of the disease being *contagious* which renders the charge of having it actionable. We are not satisfied that this assumption is warranted. The charge of leprosy certainly involved more than a mere charge of having a contagious disease. The leper lost his civil rights and all ecclesiastical privileges, he was at once cast off by society and excommunicated by the church. The physician held out no hope to him of being cured, and the priest no hope of being saved; and, besides, leprosy impeded the descent.[3] And there was a writ of *de leproso amavendo* commanding the sheriff to remove him to a solitary place. Even at this day, in those countries in which leprosy prevails, the slightest ascertained taint of the disease entails upon the sufferer a compulsory exclusion tantamount to banishment from the rest of the community, or even to perpetual detention in a lazaret; yet, strange to say, it seems, that leprosy is not a contagious disease,[4] although beyond doubt it was so esteemed at the period when the *dicta* to which we have above referred were pronounced. The charge, too, of having the *lues venerea*, was something more than a charge of having a contagious disease, at least it involved a charge of lewdness. That the bare fact of the disease being contagious was not the ground for making

[1] Unless special damage ensues. (1 Alb. L. J. 162.)

[2] There is this difference of scandal in the past tense, when it touches the mind and when it touches the body. If it be a scandal to the mind, and the affections as perjury, felony, &c., then the mind that remains is slandered; but if it be of an *accidental* infirmity or disease of the body, it is otherwise, for none now will forbear his company, though he had the plague in times past. (Coke, Ch. J.; see Smith's Case, Noy, 157; Dutton *v.* Eaton, All. 31.) As to charges in the past tense, see § 158, *ante*.

[3] Hale's Hist. Com. Law, ch. vi.

[4] Report on Leprosy to the Royal College of Physicians, prepared for Her Majesty's Secretary of State to the Colonies. (London, 1867.)

be apparent from this: was formerly called the distinguish it from *vari*-pox is a contagious dis- actionable to charge one d we find in the reports of having the pox—with- ndicate that the French as held not actionable.[1] ction carried that where the pox, it was held the ot be given to the word ment which warranted it.[2] e referred to, probably a le a charge of having the ose diseases are supposed m, and their taint heredi- true one, then the charge le equally with a charge eed, the disease be inerad- ays to have it, and lan-

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" (Davies *v.* Taylor, Cro. Eliz. or, "Thy pocky wife, her nose is with the pox" (Brook *v.* Wise, Eliz. 878), or, "The pox haunts twice a year" (Peckington's Case, Abr. Act. for Words, Y, *a*. 17), You were laid for the pox" (Aus- White, Cro. Eliz. 214), or, "Thou burnt and hast the pox" (Boxe's Cro. Eliz. 2), was held action- because French pox is implied. ster, in his Dictionary, says that word pox, without an epithet, im- s *lues venerea*.

Bonner's Case, F. Moore, 573; 4 . 17.

See Report from Select Commit- of House of Lords on the Conta- s Diseases Act of 1866, West. July, 1869; Prostitution in rela- to the National Health, West. Oct. 1869.

guage charging the having had such a disease should be actionable.

§ 176. What language published in writing concerning an individual as such, is actionable *per se* (§§ 308–323). That language in writing is actionable *per se* which denies "to a man the possession of some such worthy quality as every man is *a priori* to be taken to possess,"[1] or, which "tends to bring a party into public hatred or disgrace,"[2] or "to degrade him"[3] "in society,"[4] or, expose him to "hatred, contempt or ridicule,"[5] or obloquy,[6] or "which reflects upon his character,"[7] or "imports something disgraceful to him,"[8] or "throws contumely" on him,[9] or "contumely and odium,"[10] or "tends to vilify him,"[11] or "injure his character or diminish his reputation,"[12] or which is "injurious to his character,"[13] or to his "social character,"[14] or

[1] George on Libel, 17. See § 21, *ante*.

[2] Tenterden, Ch. J., Woodard *v.* Dowsing, 2 Man. & Ry. 74.

[3] Holroyd, J., *Id.*; Montgomery *v.* Knox, 3 So. Rep. 211; Bergman *v.* Jones, 94 N. Y. 51.

[4] Bailey, B., Forbes *v.* King, 1 Dowl. Pr. C. 627.

[5] Parmiter *v.* Coupland, 6 M. & W. 105; Gathercole *v.* Mials, 15 M. & W. 319; Miller *v.* Butler, 6 Cush. 71; Shattuck *v.* Allen, 4 Gray, 540; Commonwealth *v.* Wright, 1 Cush. 46; Hillhouse *v.* Dunning, 6 Conn. 391; McGregor *v.* Thwaites, 3 B. & C. 24; Clement *v.* Chivis, 9 B. & C. 172; 4 Man. & R. 127; Clark *v.* Binney, 2 Pick. 113; Cooper *v.* Stone, 24 Wend. 434; Colby *v.* Reynolds, 6 Vt. 489; Johnson *v.* Stebbins, 5 Ind. 364; Lansing *v.* Carpenter, 9 Wis. 540; Gabe *v.* McGinnis, 68 Ind. 538; Barr *v.* Moore, 87 Penn. St. 385; Negley *v.* Farrow, 60 Md. 158; Neeb *v.* Hope, 111 Pa. 145.

[6] Bettner *v.* Holt, 11 Pac. Rep. 713; Purdy *v.* Rochester Print. Co. 26 Hun, 206.

[7] O'Brien *v.* Clement, 15 M & W. 435; Johnson *v.* Stebbins, 5 Ind. 364; Adams *v.* Lawson, 17 Gratt. 250.

[8] Digby *v.* Thompson, 4 B. & Adol. 821; 1 Nev. & M. 485. Plaintiff published a medical work not proper for general circulation; he sent a copy to defendant, a surgeon. Defendant published that plaintiff had improperly left the work in a public place; that this was a revolting violation of decency, and a demoralizing system of puffing, etc.; *held* actionable. (Wells *v.* Webber, 2 Fos. & F. 715.)

[9] Bell *v.* Stone, 1 Bos. & P. 331; Obaugh *v.* Finn, 4 Ark. 110.

[10] Riggs *v.* Denniston, 3 Johns. Cas. 198.

[11] Shipley *v.* Todhunter, 7 C & P. 680.

[12] 2 Leigh N. P. 1360; Dunn *v.* Winters, 2 Humph. 512; Melton *v.* The State, 3 *Id.* 389.

[13] Cockayne *v.* Hodgkisson, 5 C. & P. 543. The statement that the general passenger agent of a railroad company "had grown rich by making his local ticket agents, or some of them, divide their commissions with him," held libelous. (Shattuck *v.* McArthur, 29 Fed. R. 136.)

[14] 1 Am. Lead. Cas. 138, 3d ed.

shows him to be "immoral or ridiculous,"[1] or "induces an ill opinion of him,"[2] or "detracts from his character as a man of good morals,"[3] or alters his "situation in society for the worse,"[4] or "imputes to him a bad reputation"[5] or "degradation of character,"[6] or "ingratitude,"[7] and "all defamatory words injurious in their nature."[8] A newspaper article headed "Was his a 'Graveyard' Case?" and following: "The death of D. has revived the matter of graveyard insurance. It is reported that several men had policies on his life, knowing when they were issued he was suffering from consumption, which policies, it is alleged, were obtained through a fraudulent physical examination by Dr. H." "He had been informed that policies on his son's life was held by [among others] plaintiff."[9] But to sustain an action for libel the plaintiff must either show special damage, or "the nature of the charge must be such that the court can legally presume he has been degraded in the estimation of his acquaintances, or of the public, or has suffered some other loss either in his property, character or business, or in his domestic or social relations, in consequence of the publication."[10] Where de-

[1] The State *v.* Farley, 4 McCord, 317.

[2] Hillhouse *v.* Dunning, 6 Conn. 391.

[3] Young *v.* Miller, 3 Hill, 21; Quinn *v.* O'Gara, 2 E. D. Smith, 383.

[4] 1 Starkie on Slander, 169; and see Turner *v.* Meryweather, 7 C. B. 251; Wakley *v.* Healey, *Id.* 594; Gregory *v.* Reg. 15 Q. B. 957; Capel *v.* Jones, 4 C. B. 259; Prior *v.* Wilson, 1 C. B. N. S. 95.

[5] Cooper *v.* Greeley, 1 Denio, 347.

[6] McCorkle *v.* Binns, 5 Binney, 340.

[7] Cox *v.* Lee, Law Rep. 4 Ex. 284.

[8] Chaddock *v.* Briggs, 13 Mass. 248; Pratt *v.* Pioneer Press Co., 28 No. West. Rep. 708. For some definitions of libel, see *ante*, note to § 21; The State *v.* Avery, 7 Conn. 267; Williams *v.* Karnes, 4 Humph. 9; Clark *v.* Binney, 2 Pick. 113; Baron *v.* Beach, 5 N. Y. Legal Observer, 448. A defamatory statement is not the less actionable because accompanied by a statement of the publisher that he disbelieves it. (Com. *v.* Chambers, 39 Leg. Int. [Pa.] 158.)

[9] Hurley *v.* Fall River Pub. Co. 138 Mass. 334.

[10] Cooper *v.* Stone, 2 Denio, 299; repeating Bennett *v.* Williamson, 4 Sandf. 65. "There must be some certain or probable temporal loss or damage to make words actionable; but to impute to a man the mere defect or want of moral virtue, moral duties or obligations, which renders a man obnoxious to mankind, is not actionable. (DeGrey, Ch. J., Onslow *v.* Horne, 3 Wils. 177; approved by Lawrence, J., Holt *v.* Scholefield, 6

fendant published: To the liquor dealers of Hartford: In order that you may be on your guard and protect yourselves against the base treachery of a concern you may be doing business with, I desire to state a few facts in regard to my experience with this firm. The concern I refer to is Donague Brothers. I have been in the habit of buying goods of them for years, but because I quit buying of them they went to my landlord and offered ten dollars more a month than I was paying, and after getting a lease of the premises served a notice on me to vacate. Considering the mean and unfair manner in which this firm have treated me, I have wondered whose turn would come next should anybody, like myself, exercise their right to buy of whom they like. I believe it is time to warn the trade against a firm who, because we buy of somebody else, subject ourselves to the same treatment I have received. The firm of Donague Brothers are not worthy of our support, being guilty of foul and unfair dealing to "get square," as they say, with one who exercises that right which every honest man has, who pays his bills, to trade where he likes. I believe they deserve that kind of warfare known as boycotting, and request those who believe in the fair thing between man and man to give their support to some other house. For further particulars call on J. H. Gaffy. For this publication Donague Brothers brought an action and

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T. R. 691.) Held not actionable to publish of plaintiff, "He foameth." (Kinyon *v.* Palmer, 18 Iowa, 377.) But it is said (1 Starkie on Slander, 2), "an action lies in respect of any willful communication, *oral* or *written*, to the damage of another in law or in fact, made without lawful justification or excuse." "Scandalous matter is not necessary to make a libel. It is enough if the defendant induce an ill opinion to be had of the plaintiff, or make him contemptible and ridiculous." (Holt, Ch. J., Cropp *v.* Tilney, 3 Salk. 226.) See Crocker *v.* Hudley, 102 Ind. 416. "A person cannot say anything disparaging of another that has not a tendency to injure him morally or professionally." (Tindal, Ch. J., Doyley *v.* Roberts, 3 Bing. N. C. 835; 5 Scott, 40. See in notes to § 197, *post*.) In Vermont, an action was sustained for writing the plaintiff a threatening letter. (Grimes *v.* Gates, 47 Vt. 594.) In Florida, see Montgomery *v.* Knox, 3 So. Rep. 211, and note at end of that case; and see notes, 38 No. West. Rep. 416, 857, 910.

were nonsuited.[1] Afterwards, by amendment, the action was continued in the name of one of the firm, and upon the trial he was nonsuited.[2] The appellate court said: the publication was a hostile comment upon the manner in which the plaintiff, within the pale of the law, used the power of money, in disregard of the interests of others. The public may disapprove the plaintiff's acts, but the publication does not expose him to hatred or contempt in the sense or to the degree required by the law of libel. So it was held not actionable for one who sold paint prepared ready for use, to charge the purchaser, a painter by trade, with having *adulterated* the paints bought by him of the defendant.[3]

The following language was held not actionable on its face, viz.: "The late William H. Seward, when at Yokohama, Japan, required the services of a dentist. Upon examination it was found that the inferior maxilla was completely useless for masticating purposes, there being a false joint at the seat of the original fracture, no union having taken place. This case will be remembered from the world-wide notoriety of the circumstances attending the injury, as well as the reports, which have been universally believed, that the patient was benefitted by the treatment he received for the cure of his fracture."

It assumes to give an account of a circumstance in which many may be presumed to have an interest, and does not refer to any one personally or as one of a class.[4] To impute that one has acted in business matters under a contract or obligation entered into by an assumed name—for example, that a wife made a contract by an assumed name, is not actionable.[5]

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[1] Donague *v.* Gaffy, 53 Conn. 43.
[2] Donague *v.* Gaffy, 54 Conn. 257.
[3] Lynch *v.* Febiger, 39 La. Ann. 336.
[4] Gunning *v.* Appleton, 58 How. Pr. R. 471.
[5] Bell *v.* Sun Printing & Pub. Assoc., 42 Superior Ct. (10 J. & S.) 567. "You are instructed to ship no lumber or merchandise of any description to J. L. Allen [plaintiff], except when all freight and charges are paid," held

§ 177. It is actionable to charge one *in writing* with being a villain,[1] liar,[2] rogue, rascal,[3] swindler,[4] skunk,[5] drunkard,[6] hog,[7] cuckold and tory,[8] informer,[9] libelous journalist,[10] the author or publisher of a libel or slander,[11] a hypo-

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not actionable. (Allen *v.* Cape Fear & Y. Ry. Co. [N. Car.] 6 So. East. Rep. 105.) This was an exceptional case; the complaint was not framed as for a libel.

[1] Bell *v.* Stone, 1 Bos. & P. 331.

[2] Brooks *v.* Bemiss, 8 Johns. 356; approved More *v.* Bennett, 33 How. Pr. R. 180; and see *ante*, § 144, subd. *g*. Liar and knave, see King's Case, 4 Inst. 181. A charging that one shot out of a leather gun, meaning that he was guilty of falsehood, held actionable. (Harman *v.* Delany, 2 Str. 898; and *post*, note 15, p. 208.)

[3] Rogue, rascal, swindler, villain, are libelous. (Cooke on Defam. 2.) "I look upon him as a rascal," actionable. (Williams *v.* Karnes, 4 Humph. 9.) Felon, debauchee, and seducer are actionable. (Mullett *v.* Hulton, 4 Esp. Cas. 248.) As to felon, Leyman *v.* Latimer, L. R. 3 Ex. Div. 352 (C. A.).

[4] I'Anson *v.* Stuart, 1 T. R. 748; see note 2, p. 197, *ante*, and note to § 192, *post*.

[5] Massuere *v.* Dickens, 35 No. West. R. 349; Pledger *v.* State, 3 So. East. Rep. 320.

[6] Sanderson *v.* Caldwell, 45 N. Y. 402. Charging a coroner with being drunk while holding an inquest, actionable. (Tice *v.* Drumpoole, 33 Hun, 365.)

[7] Solverson *v.* Peterson, 64 Wis. 198.

[8] Giles *v.* The State, 6 Ga. 276. In Smith *v.* Wood (2 Salk. 692), it is said to call a man cuckold is not an ecclesiastical slander, but to call him wittol is, for wittol imports his knowledge and consent. Shakespeare says: Wittol-cuckold, the devil himself hath not such a name. (Merry Wives of Windsor, act II, scene 2.) A charge in writing of want of loyalty is actionable. (Kinyon *v.* Palmer, 18 Iowa, 377.)

[9] 2 Law Reporter, 126 (London, 1821). *Informer*, not actionable. (Mawe *v.* Pigott, 4 Irish C. L. Rep. N. S. 54.)

[10] Wakley *v.* Cooke, 4 Ex. 511.

[11] Andres *v.* Koppenheafer, 3 Ser. & R. 255; Colby *v.* Reynolds, 6 Vt. 489; Viele *v.* Gray, 10 Abb. Pr. R. 1; Kerr *v.* Force, 3 Cranch C. C. 8; Russell *v.* Ligon, Vin. Abr. Act. for Words, H, *a*, 27; Clark *v.* Binney, 2 Pick. 113; Tracy *v.* Luke, 1 Vict. L. R. L. 222. Held actionable to publish "a report circulated by B. [the plaintiff] against C., stating he, C., made him, B., pay a note twice, and proved by B. to be false." (Shelton *v.* Nance, 7 B. Monr. 128.) "A report has gone abroad through the instrumentality of S. W. [the plaintiff], stating that R. W. had a load of falsely packed cotton bales, which report is a direct falsehood," was held actionable. (Woodburn *v.* Miller, Cheves, 194.) "His slanderous reports nearly ruined some of our best merchants," held actionable. (Cramer *v.* Noonan, 4 Wis. 231.) "He is a lying and slanderous rascal." (Snowden *v.* Lindo, 1 Cr. C. C. 569.) Proof in the case of an imputation of being the author of a libel (Tracy *v.* Luke, 1 Vict. Law Rep. 222.) Formerly a libeler was disqualified from making a will. (See Swinburne on Wills, pt. 1, § 8, *et seq.*; Redfield on Wills, ch. III, § 14 *a*, p. 118); and the author or publisher of a libel could receive no benefit under the will of the person libelled. (See Domat's Civil Law, bk. I, pt. ii, tit. 1, § 111, subd. vii; Gardner *v.* Helvis, 3 Lev. 248.) The Prussian Code gives the right to a parent to disinherit a child who uses defamatory words concerning him. Anciently the "*homo infamatus*" was denied the privilege of conjurators (Lea, Superstition and Force, 340), and one suspected of crime, though no accuser came forward, was kept in prison till he could prove his

gion for unworthy pur-
able fellow, it is impos-
ure to the extent of six
can hardly despise him
with having kidnapped a
into slavery ;[4] or, paid
to an office, or received
e sealer of weights and
or "doctored" weights,
he fees of his office,[6] or,
y directly or indirectly,
ns to hire, buy or induce
date for a public office,[7]
ouse for the purposes of
eprived of the ordinances
timate ;[10] or, with being
hief and a counterfeiter ;[11]
nd having the itch ;[13] or,
ballot for the election of
patent,[14] with falsehood,[15]

Villers *v.* Monsley, 2 Wils. 403. In this case the words complained of were:

"Villars, so strong of brimstone you smell,
Not long since you had got out of hell.
Of this damnable smell I no longer can bear,
Therefore I desire you would come no more here.
For old stinking, old nasty, old itchy, old mad,
If you come any more you shall pay for your yard.
You will therefore take this as a warning from me,
And never enter the doors while they belong to J. P.

For a precedent of a declaration on slanderous libel. The Miller and the Parson, see 4 Wentworth's Pleadings, 204.

Walker *v.* Winn, 8 Mass. 248.

Watson *v.* Trask, 6 Ham. 531.

Cooper *v.* Stone, 24 Wend. 434; ...ey *v.* Horton, 27 Conn. 58; ...dburn *v.* Miller, Cheves, 194; ...on *v.* Nance, 7 B. Monr. 128; *ante*, note 2, p. 207.

dishonesty,[1] blackmailing,[2] moral obliquity,[3] smuggling,[4] blasphemy,[5] false swearing,[6] insanity,[7] or being illegitimate,[8] or being fit for a lunatic asylum, and unsafe to go at large;[9] being guilty of gross misconduct in insulting females, &c.;[10] with want of chastity;[11] as engaged in serving

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[1] Hart *v.* Reed, 1 B. Monr. 166; Taylor *v.* Church, 1 E. D. Smith, 279; s. c. on appeal, 8 N. Y. 452; Fowles *v.* Bowen, 30 N. Y. 20; and see Henderson *v.* Hale, 19 Ala. 154; Hanna *v.* Blaquiere, 11 Up. Can. Q. B. R. 310. Actionable to publish of one that he had been detected in cheating at cards. (Livingston *v.* Cheatham, Pamphlet Report; Holt on Libel, 239, note.) *Detected* implies guilt (*ante*, § 144, subd. *u*). Where the defendant wrote concerning the plaintiff, his late servant, "He has now become so inflated with self-importance by the few hundreds made in my service, God only knows whether honestly or otherwise." There was an innuendo that defendant meant that plaintiff was dishonest in the service of defendant. The jury having found a verdict for the plaintiff, the court refused to disturb the verdict. (Clegg *v.* Laffer, 3 Mo. & Sc. 727.)

[2] Robertson *v.* Bennett, 44 Superior Ct. (12 J. & S.) 66; Edsall *v.* Brooks, 2 Robertson, 29; 17 Abb. Pr. R. 221.

[3] Kerr *v.* Force, 3 Cranch C. C. 8; see *post*, note to § 206 *c*.

[4] Stilwell *v.* Barter, 19 Wend. 487; and see Worthington *v.* Houghton, 109 Mass. 481.

[5] Stow *v.* Converse, 3 Conn. 325; note to § 190, *post*.

[6] Steele *v.* Southwick, 9 Johns. 214. The words were: "Our army swore terribly in Flanders, said Uncle Toby; and if Toby were here now, he might say the same of some modern swearers; the man [meaning A., the plaintiff] is no slouch at swearing to an old story;" *held* that these words, if they do not import a charge of perjury, were libelous, as they held up the plaintiff to contempt and ridicule, as being so thoughtless or so criminal as to be regardless of the obligation of an oath. "I hope you will stop swearing lies about the trees. . . . I advise you either to quit lying or preaching —one," actionable. (Adams *v.* Lawson, 17 Gratt. 250.)

[7] Southwick *v.* Stevens, 10 Johns. 443; Morgan *v.* Lingen, 8 Law Times Rep. N. S. 800; Rex *v.* Harvey, 2 B. & C. 258; Rex *v.* Creevey, 1 M. & Sel. 273; see, however, Mayrant *v.* Richardson, 1 Nott & McCord, 348.

[8] Shelby *v.* Sun Print. Co. 38 Hun, 474; 11 Cent. Rep. 869; and see Bastard, § 174, *ante*.

[9] Perkins *v.* Mitchell, 31 Barb. 461. The word "*crank*" has no necessary defamatory meaning, and to write of a pamphlet written by a lawyer, that it is the "effusion of a crank," is not actionable *per se*. (Walker *v.* Tribune Co. 29 Fed. Rep. 827.) Crank is not a modern term. A book published A. D., 1566, is entitled "A Caveat . for Common Cursetors, vulgarly called Vagabonds, . . whereto is added the tale of the second taking of the Counterfeit Crank." A glossary at the end of the book defines cranke, "young knaves and harlots that deeply dissemble the falling sickness." In Halliwell's Dictionary of Archaic Terms, one of the definitions of crank is impostor.

[10] Clement *v.* Chivis, 9 B. & Cr. 172; 4 M. & R. 127. Allegation in writing that plaintiff [a newsboy] "takes every occasion to insult Republican passengers," "he appears to have been in collusion with ruffians," actionable *per se*. (Snyder *v.* Fulton, 34 Md. 128.) Held to be actionable to write of a woman that she deserted her husband in his sickness. (Smith *v.* Smith [Mich.], 39 Alb. Law Jour. 287.

[11] Bodwell *v.* Osgood, 3 Pick. 379. A charge in writing that a certain man had planned an elopement with a married woman, naming her, was held to

writs on the anti-renters and catching Indians;[1] or for charging that the plaintiff, a married man, went through the ceremony of marriage with an actress;[2] or with having been sued for a breach of promise of marriage;[3] and to publish an obituary notice of a living person, was held actionable.[4] So it was held actionable to publish "his [plaintiff's] sons are vicious and brought up and supported in vice by their father [plaintiff] with his unlawful earnings."[5] It is actionable to charge that plaintiff, being a member of a political party, at a nominating convention of such party, offered, from the influence of a bribe, a resolution that no nomination of a candidate for a particular office should be made.[6] And publishing a notice that a charitable society acknowledged to have received from defendant a sum of money, being his moiety of a fine levied from the plaintiff for not discharging his excise duties.[7] So to publish *inter alia*, "There may be an explanation. The only decent one we can imagine is that the Board of Health wanted something done in the line of spying and sneaking, meaner and dirtier than they had the face to ask the police department to do, so they went to Col. Byrne" [plaintiff].[8] A placard on a piece of furniture in a store, "Taken back from A. B. [plaintiff], who would not pay for it; to be sold at a bargain," with another placard on

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give a cause of action to the woman. (Woodard *v.* Eastman, 118 Mass. 403.)

[1] Hallock *v.* Miller, 2 Barb. 632.

[2] Rex *v.* Kinnersley, 1 W. Black. 294; and see Caldwell *v.* Raymond, 2 Abb. Prac. Rep. 193.

[3] Morey *v.* Morning Journal, 17 N. Y. St. Rep. 266.

[4] McBride *v.* Ellis, 9 Rich. Law (So. Car.), 313; and see Horstok *v.* Boniface, 1 Menzies' Rep. 467. Libel in form of a proposed epitaph. See 35 Alb. Law Jour. 302. The proprietor of a Dublin paper, upon his examination before a committee of the House of Commons, stated: We had a telegram one night announcing the death, from *delirium tremens*, of a certain individual in the town of Cavan. It was published. The individual in question immediately brought an action for libel. We paid £10 into court, which he took out, and afterward we learned the telegram was sent by the individual himself. Report on the Law of Libel, 1879.

[5] Kirwan *v.* Tally, Cr. & Dix. Ab. Not. Cas. 388.

[6] Hand *v.* Winton, 38 N. J. 122.

[7] Stapleton *v.* Macartney, Ridgeway, L. & S. Ir. Term Rep. 90.

[8] Byrnes *v.* Matthews, 12 N. Y. St. Rep. 74.

another piece of furniture in the same store, "Beware of dead beats," held actionable.[1] Charging that plaintiff's wife did public work for the government, and received pay therefor under an assumed name, is not libelous *per se*, and the husband cannot maintain an action therefor in his own name alone, unless for special damage.[2] A newspaper notice as follows: "6 E. Y. St. Boarding. Applicants, before locating here, inform yourselves as to table, attention and characteristics of the proprietors," is not libelous *per se*.[3] In that case there was no allegation that the words affected the plaintiff in her business; had there been such an allegation the result might have been the reverse of what it was. Where it was said of an hotelkeeper that "he kept no accommodations, and a person could not get a decent meal or decent bed [in his house] if he tried," held that the language reflected upon plaintiff in his business and was libelous *per se*.[4]

§ 177 *a*. Plaintiff having defendant's bond, the validity of which was disputed, advertised it for sale; defendant, in a statement of the circumstances under which the bond was given, wrote: "His [plaintiff's] object is either to abstract money from the pocket of an unwary purchaser, or what is more likely, by this threat of publication to extort money from me;" held to be actionable.[5] And held

[1] Woodling *v.* Knickerbocker, 31 Minn. 268.

Where a barber, claiming that a customer was in his debt, put in his store window a cup with the customer's name on it, inscribed, "this man owes this shop for shaving $1.15 since 1885." In a suit by the customer for libel, he denied owing anything, and recovered a verdict. Davis *v.* Weltner, City Court of New York, Feb., 1889.

[2] Bell *v.* Sun Pr. & Pub. Assn. 3 Abb. N. C. 157; S. C. 42 N. Y. Superior (10 J. & S.) 567.

[3] Wallace *v.* Bennett, 1 Abb. N. C. 478.

[4] Trimmer *v.* Hiscock, 27 Hun, 364.

[5] Robertson *v.* McDougall, 4 Bing. 670. Joseph Coghlan was indicted for a libel on an attorney named Gee, and for threats to extort money. Gee had transactions with the brother of the accused, and each party alleged the other was indebted to him. Defendant applied to Gee for a settlement, and not being satisfied, he threatened to and did post publicly a placard as follows: "To be sold in the last week

actionable to charge one with the unauthorized publication of private letters;[1] or with entering into a corrupt agreement to benefit himself at the expense of the public, and, if elected to the Senate, would lose his influence to defeat the public interest and benefit himself;[2] or imputing to one who is an author a disregard of justice and propriety as a man, and as being infatuated with vanity, mad with passion, and the apologist from force of sympathy of another stigmatized with ingratitude and perfidy, and as having published as true statements falsified and encomiums retracted.[3] So it was held actionable to publish of one that he was "as versatile as Monroe Edwards [a noted forger] in circumventing the law of right;"[4] or that he fraudulently deceived another as to a fact, so as to induce him to indorse a note for a larger sum than he intended;[5]

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of December, at Garraway's, unless previously disposed of by private contract, a debt of £3,917 1s. 6d., owing by Mr. W. Gee, solicitor, of Bishop's Stortford. All particulars may be obtained of Mr. Joseph Coghlan, at," &c.

Baron Bramwell, at the close of the case for the prosecution, expressed his opinion that the placard in question was not a libel, and that consequently there was nothing to go to the jury. A libel meant something that was scandalous and defamatory, concerning the person to whom it referred, but all that was represented in this placard was that the prosecutor owed a debt which he was either unable or unwilling to pay. This, in his opinion, was not a libel, for it might be said of the Bank of England that it owed so many millions of money, but no one would have any fear in consequence of such a statement that he would not receive his dividends when they became due. At the same time he must express his opinion that the proceeding adopted by the defendant was a most improper one. If a man had a claim against another it was his duty to enforce it in a court of justice, and if that did not give him a remedy he must put up with it, and he had no right to endeavor to obtain what he required by a threat to publish a document of this description. With regard to the count of the indictment which charged defendant with endeavoring to extort money, he did not see that there was any evidence to support it, and the object rather appeared to be to obtain a statement of accounts. Verdict of not guilty. Hertford Assizes, March, 1865.

[1] Bacon *v.* Beach, 5 N. Y. Legal Observer, 448.

[2] Powers *v.* Dubois, 17 Wend. 63.

[3] Cooper *v.* Stone, 24 Wend. 434.

[4] Cramer *v.* Noonan, 4 Wis. 231.

[5] Kerr *v.* Force, 3 Cranch C. C. 8. In the meantime K. investigated the matter, and learned that ten of the sureties did not know they were on the bond, although H. [plaintiff], a notary public, had certified that they acknowledged the execution of such bond; held libelous *per se*. (Henderson *v.* Com'l Advertiser, 12 N. Y. St. Rep. 649; 46 Hun, 504; affi'd in Ct. of Appeals.) Alleging that plaintiff said her mother had been bitten by a cat, was afflicted with hydrophobia, . . that

or that he was prominent in the corrupt legislation of last winter;[1] or of one soliciting charity that she prefers unworthy claims;[2] or of one that, although aware of the death of a person occasioned by his improperly driving a carriage, he attended a public ball on the evening of the same day;[3] or of a man, that he attended a political meeting while his wife lay dead and unburied;[4] or of one who had contracted to relay a road with *new* material, that he had used *old* material;[5] and held actionable where a public officer published, in a report of an official investigation into his conduct, the following comments upon the testimony of a witness before the commissioners of inquiry: "I am extremely loathe to impute to the witness, or his partner, improper motives in regard to the false accusations against me; yet I cannot refrain from the remark that, if their motives have not been unworthy of honest men, their conduct in furnishing materials to feed the flame of calumny has been such as to merit the reproba-

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she acted like a cat, . . assuming the attitude of a cat in the effort to catch rats, &c., held actionable. (Stewart *v.* Swift Specific Co. 76 Ga. 280.) Actionable to publish of plaintiff that he was in debt, spent moneys intrusted to him in a fiduciary capacity, that he used improper methods of business, doctored accounts to deceive, was visionary, and had unsound business ideas, a treacherous wretch, with shallow head and unprincipled heart. (Carpenter *v.* Hammond, 1 N. Y. St. Rep. 551.)

[1] Littlejohn *v.* Greeley, 13 Abb. Prac. Rep. 41. To publish, "Wanted, Z. [plaintiff] to pay a drug bill," was held not to be actionable, but "wanted Z. (plaintiff) to pay his room rent, and not to go deadheading his way," held actionable. (Zier *v.* Hoflin, 33 Minn. 66.) A newspaper article set out the procurement of a pension by a congressman in a case of fraudulent enlistment, and afterwards used the following language, which was alleged to be aimed at the complaining witness, a candidate for public office, viz.: "Up to date President Cleveland has not seen fit . . . to tie hungry spoilshunters to the crib, who . . . have aimed to carry very doubtful pension grants and anti-convict labor bills to catch votes." Held libelous. (The State *v.* Schmitt, 49 N. J. 579.) Charging that plaintiff, a politician, had been paid $5,000 for securing the appointment of an official, and that large sums had also been paid to him for other lucrative offices, held actionable *per se*. (Weed *v.* Stimson, 11 Barb. 203; and see *ante*, page 194, note 12.)

[2] Hoare *v.* Silverlock, 12 Q. B. 624.

[3] Churchill *v.* Hunt, 1 Chit. R. 480.

[4] The People *v.* Atkins, 42 Vt. 252.

[5] Baboneau *v.* Farrell, 15 Com. B. 360; 24 Law Jour. R. N. S. C. P. 9; 1 Jur. N. S. 114.

tion of every man having a particle of virtue or honor. They have both much to repent of for the groundless and base insinuations they have propagated against me."[1] Charging that plaintiff had corruptly failed to make a proper exhibit of fruit sent to him, but had appropriated it to himself, and entered it in his own name, &c., held actionable.[2] The defendant wrote a letter, in which, referring to plaintiff, he said; "D. keeps a well-spread table, but I always consider myself in a family hotel when my legs are under his table, for the bill is sure to come in sooner or later, though I rarely dabble in the mysteries of *ecarte* or any other game. The fellow is as deep as Crockford and as knowing as the Marquis." This language was held libelous.[3] So this language was held actionable: "As you will make considerable by being summoned to court, I will advise you to go and pay George Bowman the balance you owe him for his wild hogs you killed."[4] In a newspaper article describing the means by which the stock of a worthless silver mine was, by a fraudulent scheme, sold for a large sum, the plaintiff was stated to have been employed to prepare the mine by plastering and engrafting silver ore on the limestone rock, while armed men guarded the entrance to the mine; and it was also stated that the plaintiff was an expert in preparing a mine in this way, and that his services in this regard were as valuable as those of the person through whose influence and standing the stock of the company was sold—held, on demurrer, that the article was actionable *per se*.[5] The declaration averred that plaintiffs were watchmakers, and that

[1] Clark *v.* Binney, 2 Pick. 113. It was held actionable to publish: If any person can ascertain that I. D. [the plaintiff] was married previous to 10th August, 1799, with an innuendo meaning that he was married prior to the date mentioned, and had another wife living, he being then married to E., his present wife. (Delany *v.* Jones, 4 Esp. 191.)

[2] Bettner *v.* Hall, 70 Cal. 270.

[3] Digby *v.* Thompson, 4 B. & Adol. 821.

[4] Adams *v.* Lawson, 17 Grat. 250.

[5] Williams *v.* Godkin, 5 Daly, 499.

they sold watches made for them in Switzerland, and other and superior watches made in England; that they marked the former with their firm name only, and the latter they marked with the firm name and the words, "Chronometer makers to the Queen;" and then alleged that defendant published of plaintiffs that the watches advertised by them were merely Swiss watches, and that plaintiffs imposed them upon the public as English, and at twice their true value. In a second count it was alleged that defendant charged plaintiffs with selling watches made in Switzerland as English watches, and thereby defrauded the public—held that each count disclosed a cause of action.[1] Where the declaration set out a letter addressed by defendant to the clerk of the board of guardians of a poor-law union, in respect of an allowance ordered by said board toward the maintenance of the mother of plaintiff and defendant, the letter stated that the plaintiff "has for years, without the slightest cause, systematically done everything she can to annoy me [defendant], and I am sorry to say my mother is only too glad to assist her. Some years ago they dragged me into chancery, and almost every term I am obliged to appear by counsel before the vice chancellor. They had no business to include me in the bill, as I make no claim to my late father's property. But of course it is a pleasure to my mother and Miss Fray [plaintiff] to put me to all the expense they can. Doubting as I do my mother's extreme poverty, I think the proper test of it is an order for the workhouse, the expense of which should be borne proportionately by all her children; and as Miss Fray [plaintiff] is a lady of independence, and a single woman, and can find the money for carrying on all sorts of law proceedings, she should not be exempted,"—held, on de-

[1] Russell *v.* Wilkes, 27 Up. Can. Q. B. 280. To this declaration there was a plea that plaintiffs marked their Swiss watches, "Thomas Russell & Sons, London & Liverpool," and not "Thomas Russell" only. The plea was held bad, as raising an immaterial issue.

murrer, that the declaration disclosed a cause of action.[1] And so where the defendant wrote and published of the plaintiff, a hotel and job coach proprietor by trade, and a Presbyterian by religion, that from mere motives of intolerance, he had refused the use of his hearse for the funeral of his deceased servant, because the body was about to be interred in a Roman Catholic cemetery,—held, overruling a demurrer to the declaration, that the court could not so clearly see that the language might not be actionable as to justify the withdrawal of the case from a jury.[2] And as a rule the court, on demurrer, will not construe the words *mitiori sensu*, but will see if there is anything in the language which by a reasonable intendment is actionable.[3]

§ 178. It is not actionable to charge one in writing with a breach of conventional etiquette,[4] or with an intention to put money into Wall street for shaving purposes,[5] or of having brought suit against one's mother-in-law,[6] or

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[1] Fray *v.* Fray, 34 Law Jour. C. P. 45. It may interest some of our readers to know that the plaintiff, a lady, argued the demurrer in person. "John Dick" published of William Black the novelist: "He twice married an heiress, and has made a large fortune from his works, but he is reported to be very close, and his poor relations he affects to ignore. Lately an appeal was made to him to assist an aunt who had done much for him when he was young. She had a small income of her own, and only needed two shillings and sixpence a week to keep her out of the poorhouse, but Mr. Black would not pay it. Every one has his or her weakness, and close fistedness, even to meanness, is Mr. Black's," held actionable.

[2] Teacy *v.* McKenna, 4 Ir. R. Com. Law, 374.

[3] Mawe *v.* Pigott, 4 Ir. R. Com. Law, 54; Patch *v.* Tribune Asso. 38 Hun, 368; *ante*, note 2, p. 134, and see §§ 286, 309, 362, *post*.

[4] Clay *v.* Roberts, 8 Law Times, N. S. 397; 9 Jur. N. S. 580. The charge was that plaintiff, an allopathic physician, met homœopathists in consultation, and that, in the opinion of the profession, it was improper to do so, and against etiquette; and further, that in the opinion of the profession, it was disgraceful for an allopath to meet a homœopath in consultation.

[5] Stone *v.* Cooper, 2 Denio, 293.

[6] Cox *v.* Cooper, 9 Law Times, N. S. 329. Defendant published in a newspaper as a report of a proceeding in court: "C. *v.* G. When this cause was called, the plaintiff was not in court, upon which A., who appeared for the defendant (the plaintiff's mother-in-law), applied for costs, which were allowed, and the case struck out." The declaration alleged that it did not appear by the proceedings in court that the defendant was plaintiff's mother-in-law, and that that fact was maliciously stated to create an unfavorable impression against plaintiff, and a suspicion of him, and that he ought to be regarded with suspicion of being

that plaintiff's outward appearance is more like an assassin than an honest man.[1] So the words, "the Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room," published by posting a paper on which they were written, purporting to be a regulation of a particular society, held not to be actionable.[2] It was held that to publish B. O., "game and rabbit destroyer, and his wife the seller of the same," was not libelous without innuendoes and colloquium showing the words charged an indictable offense, or affected plaintiff in his trade.[3] So to publish of plaintiff, He is the ringleader of the nine hours' system, he ruined the place by bringing about that system; not actionable, even with special damage alleged.[4] Where the language complained of was, "We are requested to state that the honorary secretary of the Tichbourne defense fund is not, and never was, a captain in the Royal Artillery; innuendo that plaintiff was an imposter, and fraudulently represented himself as a captain—held that the innuendoes were not warranted, and the language was not actionable.[5] So this language published of the plaintiff was, on demurrer, held not actionable: "Otherwise he would never have had a Mawe [plaintiff] as his chairman, and heard him declare that men who gave up all—life, liberty and home—for what they deemed the sacred cause of old Ireland, were guilty of infamous conduct; otherwise he never would have sat in silent approval while his chairman declared, 'I will watch them, and will denounce them to the tender mercies of the Corydons, the Talbots, and the Barrys.'"[6]

guilty of something wrong in suing his mother-in-law, but held no cause of action disclosed.

[1] Lang *v.* Gilbert, 4 Allan (New Brunswick), 445.

[2] Robinson *v.* Jermyn, 1 Price, 11.

[3] Reg. *v.* Yates, 12 Cox. Cr. Cas. 233.

[4] Miller *v.* David, 22 Weekly Rep. 332.

[5] Hunt *v.* Goodlake, 29 Law Times, N. S. 472.

[6] Mawe *v.* Pigott, 4 Ir. Rep. Com. Law, 54.

"This company, for good and sufficient reasons, have resolved to dismiss M." [plaintiff], entered on the books of a corporation—held not actionable, in absence of any averments to give the language an injurious meaning.[1]

The declaration alleged that the defendant published in a newspaper a notice, as follows: "Walsall Science Institute.—The public are informed that Mr. M.'s [the plaintiff's] connection with the institute has closed, and that he is not authorized to receive subscriptions on its behalf." Innuendo, that plaintiff falsely pretended to be authorized to receive subscriptions on behalf of the institute. At the trial it appeared that plaintiff was a certificated art master, and had been master at the institute. His engagements with defendants ceased in June, 1874, and he got up and became master of another school, which was called "The Walsall Government School of Art," and was opened in August, 1874; in September following, the notice complained of appeared—held that plaintiff was properly nonsuited, that the notice was not capable of the defamatory meaning attributed to it by the innuendo.[2] Where the declaration, after stating that plaintiffs, as share brokers, had bought on account of the defendant certain shares in a certain railroad company, set out the alleged libel, and which, after commencing with the word "warning," proceeded to inform the plaintiffs that the shares so bought, "under false representations of the market value," and "sanctioned" by defendant, were being sent to the committee of the railway company, with instructions to return deposit balance to defendant; and that, unless plaintiffs arranged to return such deposit money to defendant, with certain expenses, the defendant would adopt legal measures. "The amount will be taken

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[1] Maynard *v.* Farmers' Fund Ins. Co. 47 Cal. 207.

[2] Mulligan *v.* Cole, Law Rep. 10 Q. B. 550. Perhaps the publication was a privileged one. (See Hatch *v.* Lane, 105 Mass. 394; Halliday v. Ontario Farmers' Mut. Ins. Co. 33 Up. Can. Q. B. Rep. 558.)

by installments, on security being deposited with any bankers but those who recommended plaintiffs:" Held, that in the absence of any colloquium or innuendo explaining the meaning to be attached to the words, the publication was not libelous.[1] It was held not libelous to publish of one who was a druggist, "The above druggist refusing to contribute his mite with his fellow merchants for watering Jefferson avenue, I have concluded to water the avenue in front of his store for one week gratis."[2] And held not actionable to publish of one that he was engaged in a "gambling fracas" arising out of a dispute at *play*, there being no averment that illegal play was intended.[3] Where a paragraph in a newspaper merely stated that a bill had been drawn, and that the acceptance had been forged or obtained by fraud, but threw no imputation on the drawer [the plaintiff], nor insinuated that the plaintiff had practiced the fraud or committed the forgery, it was held not to amount to a libel on the plaintiff.[4] And where it was stated that the plaintiff purchased a newspaper and gave his note for it; that he was unable to pay the note, and begged for delay; and that subsequently, when sued upon it, he pleaded the statute of limitations successfully; held that, there being no charge of dishonesty, the publication was not libelous.[5] So where the defendant published

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[1] Capel *v.* Jones, 11 Jur. 396; 4 C. B. 259. The cashier of a bank sent back to the drawer, without presentation to the drawee, a draft, with these written words, "we return unpaid draft. He [drawee] pays no attention to notices." In an action for libel by the drawee against the cashier held, that as plaintiff was only bound to accept and pay the draft on presentation, the words did not impute to him any want of integrity and were not actionable *per se*. (Platto *v.* Geilfuss, 47 Wis. 491.)

[2] The People *v.* Jerome, 1 Manning's Mich. R. 142.

[3] Forbes *v.* King, 1 Dowl. 672.

[4] Stockley *v.* Clement, 4 Bing. 162. The holder of a promissory note, wrote plaintiff, "The promissory note handed by you to me, signed by yourself and B., was presented for payment. He repudiates all knowledge of said note, and unless the note is paid to me before 11 to-morrow, I shall hand the case to the procurator fiscal." Held to impute forgery, and actionable. (Mackay *v.* McCankie, 10 C. of S. Cases, 537.)

[5] Bennett *v.* Williamson, 4 Sandf. 60. The author was of counsel with the plaintiff in this case, and believes the decision has never been regarded as authoritative. The case was re-

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o his wife and family
f the will. The family
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o for business done for
property, and possesses
story has been told to

35, 9.) A newspaper article, nor of which was to make ffs objects of pity, and which ented plaintiffs as the relatives persons, but living in abject y, was held actionable. (Mof- Cauldwell, 3 Hun, 26.) Where arge was, "This Major Noah, night of the broken seal, who rted to his own use property to be stolen," meaning he ob- possession of a political letter ssed to another person, which d published, the jury failed to (Noah's Case, 3 City Hall Re- 18.) Opening a letter and ng it merely from curiosity or al motives, held to be a trespass nd not a felony. (Rex *v.* God- C. & P. 563.

appan *v.* Wilson, 7 Ohio, 190. case cannot be regarded as an rity.

me." On demurrer to the declaration, held by the majority of the court that the language was not libelous.[1]

§ 179. There is a distinction as to its actionable quality between language concerning an individual as such, and language concerning one in certain capacities or special characters. Heretofore in this chapter the attention has been solely directed to language concerning an individual as such; we have now to consider what language concerning one in certain acquired capacities or special characters is actionable *per se*. Language which is actionable, if published of an individual as such, does not cease to be actionable because published of one in a special character; and all language which is actionable as concerning an individual as such, must also be actionable when it concerns him in any special character of the kind presently to be mentioned. Our present inquiry is limited to that language which, not being actionable when published of an individual as such, becomes actionable when published, and because it is published, of him in some special character or relation. The effect of the special character of the publisher, and of the person to whom the publication is made, will be considered under the head of defenses. Where the language is actionable as concerning an individual as such, it is unimportant and unnecessary, except in some cases as affecting the amount of damages, to inquire further whether such language is also actionable as concerning him in some special character; as thus, where an action was for language alleged to be concerning the plaintiff generally and concerning him as an attorney, the language being actionable as concerning the plaintiff generally, it was held that he might sustain the action without proof of his being an attorney.[2]

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[1] Reeves *v.* Templar, 2 Jur. 137. This case commented on in Mawe *v.* Pigott, 4 Ir. Rep. Com. Law, 54.

[2] Lewis *v.* Walter, 4 D. & Ry. 810; Harwood *v.* Astley, 4 Bos. & P. 47.

§ 180. The distinction maintained between oral and written language, as regards its actionable quality when published concerning an individual as such, is not recognized in regard to language concerning one in a special character. As respects language concerning one in a special character, it makes no difference, as we suppose, in regard to its actionable quality, whether it be published orally or in writing.[1] Language in writing which concerns one in a special character, is usually actionable concerning the individual as such, and without reference to his special character, it is therefore almost exclusively in respect to oral language that questions arise as to whether it is or is not actionable as affecting one in a special character.[2]

§ 181. In connection with our present inquiry, it must be remembered that no special character which one may occupy can enhance his rights to protection, for that would be in derogation of the rule to which reference has heretofore been made (§ 138). Whatever may be the special character, the right must be the same as the right of every other individual, the right that no one shall, without legal excuse, publish language concerning another or the affairs of another which shall occasion him damage (§§ 49, 70), that is, pecuniary loss. But although one by virtue of his special character has no right superior to that of an individual as such, and who does not possess any special character, yet it must be obvious that one may occupy a position in society which will render it easier to occasion him damage than to occasion damage to one not so situated. The position of a person may render him peculiarly obnoxious

[1] Holt on Libel, 218. But he adds, "though defamation when written may be actionable under certain circumstances when the same words if spoken would not." See in note to § 18, *ante*, and note 1, p. 223, *post*, and see Weiss *v.* Whittemore, 28 Mich. 377.

[2] "The authorities are so extraordinary upon the subject of a slander upon a person in his profession that they cannot be upheld." (Willes *arg.* Galwey *v.* Marshall, 9 Ex. R. 294.)

to injury. It is this special susceptibility to injury alone, that creates the distinction between the actionable quality of language when it concerns one in a special character and when it concerns him only as an individual as such. It is not every special character the possession of which renders its possessor more than ordinarily susceptible to injury by language, and this being so we have to ascertain which are the special characters that have such an effect. It is not possible to particularize the special characters which entail this greater degree of liability to injury, but it may be stated generally that every legal occupation or position from which pecuniary benefit may or possibly can be derived, will create in the follower of such occupation or the holder of such position, that peculiar or special susceptibility to injury by language to which reference has already been made; and hence results this rule, that language concerning one in any such lawful occupation or position may, as a necessary consequence, occasion him damage, which would not have that consequence if it concerned him as an individual merely; and therefore, as heretofore (§ 132) observed, language which would not be actionable if it concerned only an individual as such, may be actionable if it concerns him in his special character.[1] The rule which makes language concerning one in a special character sometimes actionable, when the same language concerning one as an individual merely would

[1] Brown *v.* Smith, 13 C. B. 596. "For the reason that from the nature of the case it is evident that damage must ensue." (McMillen *v.* Birch, 1 Binn. 178; and see Goldsmith *v.* Glatz, 6 N. Y. St. R. 635.) "The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in the case of another person; and if bare words are so, it will be stronger in the case of a public newspaper which is so diffusive." (Harman *v.* Delany, 2 Str. 898.) "In case of slander of a person in the way of his trade, the fact of his being in trade stands in the place of special damage." (Williams, J., Rolin *v.* Steward, 14 C. B. 603.) Can a married woman in England, carrying on a trade on her separate account, sustain an action for injury to her trade by reason of language? See *dictum*, Summers *v.* City Bank, Law Rep. 9 C. P. 583.

not be actionable, is in reality nothing more than a phase of the rule (§ 134) that language connected with any fact affecting its meaning or effect, must be construed in connection with such fact. The language being connected with the fact of the special character of the person whom it concerns, must be construed in reference to such special character.

§ 182. Limiting ourselves for the present to occupations, we conclude that subject only to the conditions (1) that the occupation is one in which a person may lawfully be engaged (§ 183), and (2) that it is an occupation which does or reasonably may yield, or may be expected to yield, *pecuniary* reward, there is no employment—call it business, trade, profession or office, or what you will[1]—so humble nor so exalted but that language which concerns the person in such his employment will be actionable, if it affects him therein in a manner that may, as a necessary consequence, or does as a natural or proximate consequence, prevent him deriving therefrom that pecuniary reward which probably he might otherwise have obtained.[2] We state the rule much broader than usual. Ordinarily it is said that the language must concern one in his business, profession or office, and then is discussed what occupations are comprised within the terms business or profession, and what kind of office is intended. In one case[3] it

[1] Business includes trade and more. "Trade has a more restricted meaning than business." (Harris *v.* Amery, Law Rep. 1 C. P. 154.) The word business embraces everything about which a person can be employed. (Parker Mills *v.* Com'rs of Taxes, 23 N. Y. 244.) Business is an elastic word, of which an exhaustive definition cannot be given. (*Ex parte* Breull, 16 Ch. Div. 487, cited Lewis *v.* Graham, 20 Q. B. D. 781.)

[2] Foulger *v.* Newcomb, Law Rep. 2 Ex. 327. See note 1, page 225, *post*.

[3] Wharton *v.* Brook, 1 Vent. 21. Where I. S. said to A., who kept a stable and received horses at livery (a livery-stable keeper), "Thou buyest nothing but rotten hay to poison men's horses," it was held that A. could not maintain an action therefor because he was not of any trade allowed in law. (Jones *v.* Joice, Vin. Abr. Act. for Words, U, *a*, 7.) Livery-stable keeping is recognized as a business in which one may be libeled. See Southam *v.* Allen, T. Raym. 231; Alexander *v.* Angle, 1 Cr. & J. 143; 4 M. & P. 870.

was said *obiter* that to call a woman who taught children to read and write (a school teacher or school mistress) a whore was not actionable, because she was not in a *business* or *profession*. For the same reason, Lord Hale, in another case, was for denying the right to recover to a *letter carrier* charged with breaking open letters. The tenor of his lordship's remarks was that if such an action could be maintained, a man should not speak disparagingly of his cook or his groom but an action would be brought.[1] It was said of a renter of tolls that he was not in a business or profession in which he could be slandered or libeled,[2] and the like was held of a stock broker.[3] On the other hand, it has been held that the business need not be one which renders him who follows it liable as a trader to the bankrupt law,[4] and that the same rule applies to a mere trader or retail dealer as to a merchant.[5] It was supposed formerly that the rule was limited to occupations by which the person whom the language concerned obtained his livelihood or "daily bread;" but such a limitation, if it ever existed, no longer prevails. It is now held to be sufficient if the person whom the language concerns

[1] 1 Vent. 275. "The humility of the employment or occupation seems no objection to the action, either in law or in reason." (1 Starkie on Slander, 128; and see Cooke on Defam. 21; Terry *v.* Hooper, 1 Lev. 115.) The courts have not one rule for one individual, and a different rule for another, or one for the rich and another for the poor. (Rex *v.* Ld. Cochrane, 3 Maule & S. 10; Sinclair *v.* Charles Phillipe, 2 B. & P. 363.) In Cockaine *v.* Hopkins, 2 Lev. 214, the plaintiff alleged that he used the art of buying and selling and gained great profit thereby, and that defendant said of him, He is a *runagate*, whereby he [plaintiff] lost his customers, but did not allege special damage; after verdict for plaintiff, judgment was arrested because, as the court said, runagate was not equivalent to bankrupt, and as plaintiff did not allege what trade he followed, it might be a *tinker* or *peddler*, who is a rogue by statute. This presuming that plaintiff's trade is unlawful was done in Morris *v.* Langdale, 2 Bos. & Pul. 284; but at this day the presumption would be the other way. See *post*, note 4, p. 227.

[2] Bellamy *v.* Burch, 16 M. & W. 590; and see Sellers *v.* Killen, 7 Dowl. & R. 121; S. C., *sub nom.* Sellers *v.* Till, 4 B. & C. 655.

[3] Morris *v.* Langdale, 2 Bos. & Pul. 284.

[4] Whittaker *v.* Bradley, 7 Dowl. & R. 649; S. C. Whittington *v.* Gladwin, 5 B. & C. 180; 2 Car. & P. 146.

[5] Gates *v.* Bowker, 18 Vt. (3 Wash.) 23; Ostrom *v.* Calkins, 5 Wend. 264; Carpenter *v.* Dennis, 3 Sandf. 305.

habitually (as distinguished from occasionally) acts in or pursues the occupation to derive an emolument from it.[1] Where it was objected against the plaintiff's right to recover that it was not alleged he got his living by his occupation, the objection was overruled.[2]

§ 183. We mentioned in the last preceding section (§ 182) as one of the conditions to the right of action for language concerning one in his occupation, that the occupation must be a lawful one (§ 302). It is a universal rule, of which very numerous examples are to be found in the reports, that one engaged in an unlawful pursuit cannot recover for work done or goods sold by him, nor for any injury he may sustain in such occupation;[3] hence for language concerning a person in an unlawful occupation, an action is not maintainable.[4] Thus it was held that pugilistic exhibitions being illegal, one could not maintain an action for language affecting him as proprietor of a tennis court where such exhibitions were made;[5]

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[1] Babonneau *v.* Farrell, 15 C. B. 360; Bryant *v.* Loxton, 11 Moore, 344; Davis *v.* Davis, 1 Nott & M'C. 290. "The action seems to extend to words spoken of a person in any lawful employment in which he may gain his livelihood." (1 Starkie on Slander, 127.) "It does not appear to be necessary that the party should gain his living in the character to which the slander is applied, but it is sufficient if he habitually act in that character and derive emolument from it. (*Id.* 129.)

[2] Dobson *v.* Thornistone, 3 Mod. 112.

[3] Timmerman *v.* Morrison, 14 Johns. 369; Allcott *v.* Barber, 1 Wend. 526; Smith *v.* Tracy, 2 Hall, 465; Bailey *v.* Mogg, 4 Denio, 60; Finch *v.* Gridley, 25 Wend. 469; Smith *v.* Wilcox, 24 N. Y. 353; s. c. 19 Barb. 581, and 25 Barb. 341; Cundell *v.* Dawson, 4 C. B. 376; Best *v.* Bauder, 29 How. Pr. R. 489; Ferdon *v.* Cunningham, 20 *Id.* 154; Cope *v.* Rowland, 2 M. & W. 149; Smith *v.* Mawhood, 14 M. & W. 452; Johnson *v.* Simonton, 43 Cal. 242; Seneca County Bk. *v.* Lamb, 26 Barb. 595; Barton *v.* Port Jackson Plank Road, 17 Barb. 397; Griffith *v.* Wells, 3 Denio, 227; Bell *v.* Quin, 2 Sandf. Superior Ct. 146; Taylor *v.* Crowland Gas Co. 10 Ex. 293; 18 Jur. 913; Cowan *v.* Milbourn, Law Rep. 2 Ex. 230; Daily Telegraph Co. *v.* Berry, 5 Vict. L. R. 469; 2 Pars. on Contr. 259; Story on Contr. 620; note to § 302, *post*. There can not be a copyright in a libelous publication. Drone on Copyright, 181.

[4] See note to May *v.* Burras, 13 Abb. N. C. 388; Honeggar *v.* Weltstein, *Id.* 393. Where the illegality appears on the face of the complaint, defendant may demur. (Dauphin *v.* Times Pub. Co. 18 The Reporter, 10.) Where the illegality does not so appear, it must be pleaded. (Fry *v.* Bennett, 28 N. Y. 324.)

[5] Hunt *v.* Bell, 1 Bing. 1. An agent for a lottery cannot maintain an action for language concerning him in

and *semble* one who practices as a physician without being duly licensed cannot maintain an action for language concerning him as a physician.[1] The fact, however, that a person is engaged in an unlawful occupation is no reason for his not being allowed his action for any language concerning him as an individual, or concerning him in any other and lawful occupation in which he may be engaged.[2] If the language be actionable as concerning the person as an individual merely, it is unimportant and unnecessary to inquire further whether he is in any or in what occupation, legal or otherwise.[3] If the illegality of the occupation proceeds from the fact that the person following it is not duly licensed, the burden is on the publisher to show that the person whom the language concerns was unlicensed.[4]

§ 184. As to the kind of office which one must hold to render actionable language which concerns him in such office, it is laid down by Starkie, but, as we conceive, erroneously, that "words are equally actionable, whether the office be lucrative or merely confidential."[5] Pecuniary

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that occupation. (Dauphin *v.* Publish. Co. 18 The Reporter, 10.)

[1] March *v.* Davison, 9 Paige, 580, referring to a statute since repealed.

[2] Yrisarri *v.* Clement, 2 C. & P. 223; 3 Bing. 432; 11 Moore, 308; Greville *v.* Chapman, 1 D. & M. 553; Chenery *v.* Goodrich, 98 Mass. 224. In Manning *v.* Clement, 7 Bing. 362; 5 M. & P. 211, the plaintiff alleged he was a manufacturer of bitters, and defendant was allowed to introduce evidence of the illegality of such manufacture (namely, that the alleged bitters were another and a prohibited article), not as a justification, but in contradiction of plaintiff's allegation. See note to § 302, *post*.

[3] Harwood *v.* Astley, 4 Bos. & P. 47; Lewis *v.* Walter, 4 D. & Ry. 810. Sanderson *v.* Caldwell, 45 N. Y. 398, charges the plaintiff with being a public robber—innuendo, he, plaintiff, had defrauded the public in his dealings with them. It is not necessary for plaintiff to aver that he is any office, trade, or employment in which he could have defrauded the public. (Taylor *v.* Carr, 3 Up. Can. Q. B. Rep. 306.) See note to § 190.

[4] Fry *v.* Bennett, 28 N. Y. 324; Smith *v.* Joyce, 12 Barb. 25. See note 1, p. 225.

[5] 1 Starkie on Slander, 119. He states that the whole class of cases in which recovery has been had for words affecting one in office not lucrative "seems to rest on more dubious principles than any other." At page 122 he says—erroneously, as we conceive—"the danger of exclusion from office gives rise to the action." And at page 118 he says the ground of action is "somewhat different" according as the office is confidential or lucrative. And at page 124 he says

loss is the gist of the action for slander or libel (§ 57); and as no pecuniary loss can result from language concerning one in an office which yields no pecuniary emolument, words not otherwise actionable cannot become so, because they concern one in such an office.[1] Whatever may have been the doctrine and practice of the Court of the Star-Chamber, or of the common-law courts under the statutes *scandalum magnatum*, we believe that no court proceeding, according to the common law, and independently of any statute, has sanctioned the doctrine as laid down by Starkie. Wherever language concerning one in an office merely honorary has in a common-law court, and independently of any statute, been held actionable, it will be seen that the language would have been actionable had it been published of an individual as such.

§ 185. Another relation or special character in which one may be injuriously affected by language, is that of partner. Language may concern partners, or one or some of several partners, in their or his individual capacity merely, or it may *touch* them or him in their or his partnership business. As respects language concerning one who is a partner, and which concerns him as an individual merely, the fact of his being a partner, unless, perhaps, as affecting the damages, has no significance. Language concerning partners in their partnership business may be actionable *per se*, or actionable only by reason of the special damage. The language touching the business which would

"the action appears to extend to all offices of *trust* or profit without limitation, provided they be of a *temporal* nature." This word *temporal* is used as the converse of *spiritual*, to exclude the ecclesiastical jurisdiction.

[1] Gallwey *v.* Marshall, 9 Ex. 294. In that action, the language (oral) imputed incontinence to a clergyman. The court, in deciding against the plaintiff, said: "We should have no doubt of the plaintiff's right to recover if the declaration had averred that he was *beneficed*, or was in the actual receipt of professional *temporal emolument*, . . . as the charge would have caused the loss of the benefice or the emoluments. In the absence of any averment of plaintiff having any office of temporal (pecuniary) profit, we are not satisfied this action will lie. There is no authority that it will where there is no actual damage."

be actionable *per se* if published concerning one who is not a partner, would be actionable *per se* as concerning partners or one who is a partner. Actionable language concerning partners, and which touches them in their partnership business, is an injury to their joint business, *and* is a joint and several injury, for which both may sue jointly or either may sue separately (§ 303). Thus where the language imputed to two persons, who were partners as wool-staplers, that they had been guilty of fraud in a sale of wool, and they sued jointly, alleging special damage to their trade, the action was sustained.[1] For words charging partners with making an assignment to defraud their creditors, an action by one partner was allowed;[2] and where the *firm* was charged with insolvency, the language used being "J. T. & Co. are down," held a joint action might be maintained.[3] In such a joint action no damages are recoverable for the injury to the feelings of the partners.[4] Where language concerns one only of several partners, but touches him in his partnership business, there is an injury to the partnership business, for which the partner whom the language concerns may sue alone, or all the partners may unite with him. Thus where the language was of one of several partners as bankers, and imputed to him insolvency, and for this he alone brought suit, alleging damage to the partnership business, it was pleaded in abatement that the plaintiff carried on his business jointly with A. B., and that the alleged damage accrued to A. B. jointly with the plaintiff. On general demurrer the plea was overruled, but a question was raised whether a special demurrer might not have been interposed

[1] Cook *v.* Batchelor, 3 Bos. & Pul. 150; see note to Goldstein *v.* Foss, 2 Car. & P. 252.

[2] Odiorne *v.* Bacon, 6 Cush. 185.

[3] Titus *v.* Follett, 2 Hill, 318; and see Forster *v.* Lawson, 3 Bing. 452; Le Fanu *v.* Malcolmson, 1 Ho. of Lords Cas. 637; Maitland *v.* Goldney, 2 East, 426; Beardsley *v.* Tappan, 1 Blatch. C. C. Rep. 588. See Corporations.

[4] Haythorn *v.* Lawson, 3 Car. & P. 196; Donague *v.* Gaffy, 53 Conn. 43.

to the declaration for uniting damages which accrued to the plaintiff with damages which accrued to his partner. In other words, as the damage to the business was jointly to the plaintiff and his partner, was it proper for plaintiff to allege them in his declaration? It was assumed that on the trial the jury would separate the damages,[1] and in other cases, one of several partners sustained an action for libel on him in his business.[2] Where the language published purported to give information as to the credit and standing of a mercantile firm, and charged one member with dishonesty, a joint action by all the partners was sustained.[3] Where the partners unite in the action, or where the partner whom the language concerns sues alone, in either case the language being of the kind called actionable *per se* (§§ 146, 147), the action may be maintained without any allegation or proof of special damage;[4] but where a partner whom the language does not personally concern sues alone for language personally concerning his partner, in that case the action cannot be maintained unless there be an allegation and proof of special damage. A recovery by the partner whom the language personally concerns would not bar an action by his partner, and probably would not bar a separate action by all the partners; nor would a recovery by all the partners be a bar to a separate action by the partner whom the language personally concerns.[5]

§ 186. The circumstance of one being heir presumptive has been held to give an actionable quality to lan-

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[1] Robinson *v.* Marchant, 7 Q. B. (Adol. & Ell. N. S.) 918.

[2] Fidler *v.* Delavan, 20 Wend. 57; and see Solomons *v.* Medex, 1 Stark. R. 191; Harrison *v.* Bevington, 8 Car. & P. 708; and Davis *v.* Ruff, 1 Cheves, 17. This last-named case is commented on in Taylor *v.* Church, 1 E. D. Smith, 287.

[3] Taylor *v.* Church, 1 E. D. Smith, 279; s. c. 8 N. Y. 452.

[4] *Id.;* 2 Saund. Pl & Ev. 117*a*, 117*b*, 6th ed.; and see Forster *v.* Lawson, 3 Bing. 452; 11 Moore, 360.

[5] Taylor *v.* Church, 1 E. D. Smith, 279.

guage concerning him in that character. Starkie devotes a chapter to a partial review of the cases in which, on the ground that it may cause his disinherison, it has been held actionable to call a presumptive heir bastard, and he concludes that, although such decisions carry the doctrine of presumptive loss to a great extent, they seem to be warranted by the application of sound and general principles. He does not state what those principles are, and for ourselves we can discover no principle which will support such decisions. It certainly is not a *necessary* consequence that one should disinherit his presumptive heir because it has been said of him that he is a bastard.

§ 187. One being a candidate for an office or for employment does not have the effect to make language concerning him in that character actionable *per se*, otherwise than as it would be actionable *per se* if it concerned him as an individual merely.[1] If the language concerning a candidate for office or employment occasions him special damage, as the failure to obtain such office or employment, it will be actionable; thus if a clergyman is to be presented to a benefice, and one to defeat him says to the patron: "He is a heretic, or a bastard, or excommunicated," and he thereby loses his presentment, he may have his action;[2] and where a lawyer was a candidate for the office of steward of a corporation, and the electors being assembled to make an election, one of them said to the others: "He [said candidate] is an ignorant man and not fit for the place," by means of which he was refused, the court inclined to the opinion that the words were actionable, but no judgment was given.[3] The fact of one being

[1] Powers *v.* Dubois, 17 Wend. 63; Prinn *v.* Howe, 1 Brown's Cas. Parl. 64; Littlejohn *v.* Greeley, 13 Abb. Prac. Rep. 41; Hunt *v.* Bennett, 4 E. D. Smith, 649; 19 N. Y. 173.

[2] Davis *v.* Gardiner, 4 Coke, 16.

[3] Sanderson *v.* Ruddes, Mar. 146. Words which will cause others not to vote for him of whom they were spoken, at an election at which he is a candidate, are actionable. (Brewer *v.* Weakley, 2 Overt. 99.)

a candidate for an office or for employment, in many instances affords a license or legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse did he not occupy the position of such a candidate. The consideration of language concerning one as a candidate for office or for employment falls more appropriately under the head of legal excuses or defenses, and it will be there discussed. (§ 247.)

§ 188. As regards the kind of language concerning one in an occupation or office which will confer a right of action, it has been said: "Words are actionable when spoken of one in an office of profit, which may *probably* occasion the loss of his office, or where spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage."[1] "If the words be of *probable* ill consequence to a person in a trade or profession or an office."[2] Bayley, B., objected to this rule, that the words *probably* and *probable* were too indefinite, unless considered equivalent to "having a *natural* tendency to," and as confined within the limits of showing the want of some necessary qualification or some misconduct in the office, it went beyond what the authorities warranted.[3] But, "How is a *natural* stronger (more definite) than a *probable* tendency?"[4] To maintain an action for words spoken, they must impute some matter in relation to the party's particular trade or vocation, and which, if true, would render him unworthy of employment.[5] "Every authority which I have been able to find either shows the want of some general requisite, as honesty,

[1] De Grey, Ch. J., Onslow *v.* Horne, 3 Wils. 186.

[2] Same case, as reported 2 W. Bl. R. 753.

[3] Lumby *v.* Allday, 1 Cr. & J. 301; 1 Tyrw. 217.

[4] Williams, J., James *v.* Brook, 9 Q. B. 7; and see Sibley *v.* Tomlins, 4 Tyrw. 90.

[5] Kinney *v.* Nash, 3 N. Y. 177; Fowles *v.* Bowen, 30 N. Y. 24; Cruikshanks *v.* Gordon, 48 Hun, 308.

capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business;"[1] or his office of trust and place of honor, provided they be of a temporal nature;[2] and "We ought not to extend the limits of actions of this nature beyond those laid down by our predecessors."[3] Although every lawful lucrative occupation is, as regards the actionable quality of language, governed by the same general principles, yet the kind of occupation affects the application of the principles, and the identical language which may be not actionable as concerning one in some certain occupation, may be actionable as concerning one in some other occupation. The test in every case by which to decide if the language be actionable, meaning actionable *per se*, is, does it necessarily occasion damage? and because the language which may necessarily occasion damage in one occupation will not have that effect in some other, it happens that in every case regard must be had to the character of the occupation. Numerous illustrations of this are to be found in the subsequent part of this chapter. We select one instance: In the case of a

[1] Bayley, B., Lumby *v.* Allday, 1 Cr. & J. 301; 1 Tywr. 217; approved Ayre *v.* Craven, 4 Nev. & M. 220; and see Jones *v.* Littler, 7 M. & W. 423; Southee *v.* Denny, 1 Ex. 196; James *v.* Brook, 9 Q. B. 7. The words: A., my successor in business, is not legally responsible for his contracts, as he is yet a minor, under 21 years of age. A word to the wise is sufficient, actionable. (Hays *v.* Mather, 15 Bradw. [Ill.] 30.)

[2] How *v.* Prinn, Holt, 652; S. C. Prinn *v.* Howe, 1 Brown's Cas. Parl. 64; 1 Starkie on Slander, 124. "A distinction is usually taken between an office of profit and an office of honor, but the distinction is not a sound one, and though it may apply to an action for words, it does not extend to an action for libel." If a person be in an office of profit, it is libelous to impute to him either inability, want of integrity, or anything which amounts to it. But if the office be an office of honor, it is said no action lies except the import of the words be a charge of dishonesty. In either case, charging a man with inclinations and principles which show him unfit for an office of trust or honor is libelous, without charging him with any act. Any imputations against a person who is in the enjoyment of an office, either public or private, of honor, profit, or trust, which import a charge of unfitness to administer the duty of the office, are libelous. (Holt on Libel, 208.) Words which charge a breach of a public trust are actionable. (See Kinney *v.* Nash, 3 N. Y. 178; Taylor *v.* Carr, 3 Up. Can. Q. B. Rep. 306.)

[3] Pollock, Ch. B., Gallwey *v.* Marshall, 9 Ex. 294.

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and in Todd *v.* Hastings (Vent.
7), it was held that to charge a
ader with keeping "*false books*"
ould be construed to mean "false
bt-books." Keeping books of ac-
ount is necessary in this country,
here credit is generally given, as
ell by the mechanic as by the mer-
hant and professional man. (Burtch
Nickerson, 17 Johns. 217.) Me-
hanics "generally sell on credit, and
eir success and reputation depend
on their character for fair dealing."
athbun *v.* Emigh, 6 Wend. 407.)
nother reason why a charge of keep-
g false books of account was held
tionable was, that such books, if gen-
ally reputed correct, were receivable
evidence of their contents. (Craw-
ot *v.* Dale, Vent. 263.)

maintained that special character at the time the language was published (§ 386).[1] Where the plaintiff had been commissioner to make a treaty with the Indians, and after his commission had terminated, the defendant charged him orally with hiring and bribing the Indians to sign such treaty, held that no action could be maintained.[2] Where plaintiff was twice constable, once in 1843 and again in 1846, and during the latter period one said of him orally that, while constable in 1843, he had made a false return, held that the words would not support an action.[3] If a man has been a merchant and leaves off merchandising for a time, and another calls him bankrupt, an action lies; for though he does not use the trade of a merchant at the time of the speaking the words, yet he *remains a merchant*, and may resume the trade at his pleasure;[4] but where the plaintiff alleged he had for many years used the trade of a drover, but without alleging he was a drover at the time of the publication, it was held he did not show a cause of action.[5] Whether or not the plaintiff occupied the special character alleged, and whether or not he continued in such special character until the time of the publication complained against, are questions of fact.[6] A

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[1] Smayles *v.* Smith, Brownl. 1; Reignald's Case, Cro. Car. 563; Jordan *v.* Lyster, Cro. Eliz. 273; Dotter *v.* Ford, *Id.* 794; Bellamy *v.* Burch, 16 M. & W. 590; Allen *v.* Hillman, 12 Pick. 101; Forward *v.* Adams, 7 Wend. 204; Windsor *v.* Oliver, 41 Ga. 538; Dicken *v.* Sheperd, 22 Md. 399; Oram *v.* Franklin, 5 Blackf. 42; Harris *v.* Bailey, 8 New Hamp. 216. See 2 Vent. 366, where it is said, "Where a man *had been* in an office of trust, to say he behaved himself corruptly in it, as it imported great scandal, so it might prevent his coming into that or the like office again." (See § 290, *post.*)

[2] Forward *v.* Adams, 7 Wend. 204.

[3] Edwards *v.* Howell, 10 Ired. 211. But it was said plaintiff might have recovered on proof of special damage.

[4] Gardyner *v.* Hopwood, cited Yelv. 159; and see Vin. Abr. Act. for Words, U, *a*, 19. Publishing of a drover, he is bankrupt, actionable. (Lewis *v.* Hawley, 2 Day [Conn.], 497.) An attorney who has not taken out his annual certificate, although he is by statute disabled from recovering his fees, nevertheless continues an attorney, and may maintain an action for language concerning him as an attorney. (Jones *v.* Stevens, 11 Price, 235; Pearce *v.* Whale, 5 B. & C. 38; Morris *v.* Langdale, 2 Bos. & P. 284; see § 183, *ante.*)

[5] Collis *v.* Malin, Cro. Car. 282.

[6] Gribble *v.* Pioneer Press Co. 34 Minn. 342.

person shown once to have been in any certain office, profession, or trade, is presumed to continue therein.[1] The decisions which are sometimes referred to as exceptions to the rule that the person whom the language concerns must maintain his special character at the time the language is published, are really not exceptions to that rule; they are cases which follow another and different rule because comprehended in a different class. On examination they will be found to range themselves under the division relating to language concerning an individual as such; and the true ground on which in such cases the actions were sustained, was of the language being actionable as affecting the individual as such, without regard to his having occupied the special character to which the language refers. Thus where one had been senator, and after his term of office had ceased it was published of him in writing that he had been guilty of corrupt conduct in his office of senator, the action was sustained;[2] and so where one had been a constable, and after he quitted that office it was said of him that, while in office, he was a healer of felons, or of one that, when in office as a justice, he was a bribing justice.[3]

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[1] Tuthil *v.* Milton, Yelv. 158; Collis *v.* Malin, Cro. Car. 282: Jordan *v.* Lyster, Cro. Eliz. 273; Moore *v.* Synne, 2 Rolle R. 84; Dod *v.* Robinson, All. 63; Forward *v.* Adams, 7 Wend. 204; Bellamy *v.* Burch, 16 M. & W. 590; Fry *v.* Bennett, 28 N. Y. 324; but see McLeod *v.* Wakley, 3 Car. & P. 311. Where a plaintiff avers generally that he filled any office, or exercised any trade, his filling such office or being of such trade is sufficiently proved by evidence of his having acted in such office or carried on such trade. And in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters, without proving their appointments. (Berryman *v.* Wise, 4 T. R. 366; Gordon's Case, Leach Cr. L. 515; Rex *v.* Shelly, *Id.* 340, n.)

[2] Cramer *v.* Riggs, 17 Wend. 209; and see 7 Wend. 204; Wilson *v.* Noonan, 23 Wis. 105; Littlejohn *v.* Greeley, 13 Abb. Prac. Rep. 41; Walden *v.* Mitchell, 2 Vent. 266; Russell *v.* Anthony, 21 Kans. 450.

[3] Pridham *v.* Tucker, Yelv. 153; and see Herle *v.* Osgood, 1 Vent. 50. To say of a commissioner appointed to take testimony, he hath taken bribes (Moore *v.* Foster, Cro. Jac. 65), and charging an officer of a court of record with taking bribes, held actionable. (Anon. Dal. 43; Nile *v.* Swanston, Yelv. 142.) Charge that plaintiff, a prosecuting attorney, refused to prosecute a suspected murderer, because the law forbade his taking

§ 190. To render language concerning one in a special character or relation actionable, "it must touch him" in that special character or relation; for, unless it does, it must be judged in regard to its actionable quality by the rules which apply to language concerning an individual as such.[1] That the language "must touch" the person whom it concerns in his special character, means only that it must concern him in such special character, and affect him therein. It is not sufficient that the language disparages him generally, or that his general reputation is thereby affected;[2] it must be such as, if true, would disqualify him or render him less fit properly to fulfill the duties incident to the special character he has assumed.[3] It is not enough that the language "tends to injure the person in his office, profession or trade, it must be spoken [published] of him in his official or business character."[4] It must "touch him in his office,

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bribes, held actionable *per se* (The People *v.* Jones, 35 No. West. Rep. 419); and so to publish of an attorney for a city, that he abandoned his client's cause by resigning his office in the midst of a litigation brought on by his advice, to the detriment of his client. (Hetherington *v.* Sterry, 28 Kans. 426.)

[1] Publishing of a bank teller [plaintiff] that he was suffering from overwork and his mental condition was not entirely good, that there had been trouble in the bank's affairs, occasioned by such mental derangement of its teller, and that the statement of the teller, when probably he was not responsible for what he said, had caused bad remarks concerning the bank, held not libelous *per se*. (Moore *v.* Francis, 20 N. Y. St. Rep. 641.) That the language did not affect him in his occupation of bank teller. (*Id.* See in note to § 197, *post*.)

[2] Sanderson *v.* Caldwell, 45 N. Y. 398. This implies, of course, that the language is not such as would be actionable if published of one individually. Language actionable of an individual is not now the subject of consideration. (See § 179, *ante*.) Charging one to be untruthful, profane, and a libertine, held not to affect a man in his profession or occupation. (Com'wealth *v.* Wardwell, 136 Mass. 164.)

[3] To publish of an architect, "the poor fellow is crazy," and that "his appointment (as architect of a public building) could be regarded in no other light than a public calamity," held actionable *per se*. (Clifford *v.* Cochrane, 10 Bradw. [Ill.] 570.) So of a statement by the owner of a vessel that the pilot [plaintiff] had been paid to run the vessel ashore (Monsette *v.* Jodoin, 12 Low. Can. Rep. 333), and so imputing to an actor general carelessness as to his dress and delivery. (Ireland *v* King, 5 A. J. R. 24.)

[4] Van Tassel *v.* Capron, 1 Denio, 250; Sibley *v.* Tomlins, 4 Tyrw. 90; Doyley *v.* Roberts, 3 Bing. N. C. 835; Redway *v.* Gray, 31 Vt. (2 Shaw) 292; Buck *v.* Hersey, 31 Maine (1 Red.), 558; Sayers *v.* Bachelor, 7 Ir. Jur. O. S. 257; MacDougall *v.* Tyrrell,

profession, or trade."[1] Thus, saying of a justice of the peace, "There is a combined company here to cheat strangers, and Squire Van Tassel has a hand in it. I don't see why he did not tell me the execution had not been returned in time, so that I could sue the constable;"[2] or, "Squire Oakley is a damned rogue,"[3] was held to impute misconduct as a man and not as a magistrate, and not to be actionable. Where plaintiff alleged that he was a physician and coroner, and that defendant published concerning him: That a stiffened body was found in the highway; to all appearances the man was frozen; there were no

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1 Ir. Jur. N. S. 465. It seems, however, that where one is in business, words spoken of him in his private character will bear an action, if they are such as must necessarily affect him in his business; thus to say of a brewer, he had been locked up in a sponging-house (a private jail kept by deputy sheriffs, where persons arrested for debt, on paying for the indulgence, have the option of remaining instead of going to the debtor's prison), was held actionable, because the words were held necessarily to affect his credit as a trader. (Jones *v.* Littler, 7 M. & W. 423; and see Bell *v.* Thatcher, Freem. 277; Fowles *v.* Bowen, 30 N. Y. 23; Starr *v.* Gardner, 6 Up. Can. Q. B. R. O. S. 512; Taylor *v.* Carr, 3 Up. Can. Q. B. R. 306.) So in Davis *v.* Ruff (1 Cheves, 17), it is said that words affecting the pecuniary credit of a merchant need not be averred nor proved to have been used in relation to his occupation as a merchant, for, in their nature, they strike at the root of mercantile character.

1 Kinney *v.* Nash, 3 N. Y. 177; Van Tassel *v.* Capron, 1 Denio, 250; Comyn's Dig. Act. for Defam. D, 27; Van Epps *v.* Jones, 50 Ga. 238. Whether words were spoken of a man in certain capacity, is a question of fact for the jury. (Skinner *v.* Grant, 12 Vt. 456; Sibley *v.* Tomlins, 4 Tyrw. 90; Doyley *v.* Roberts, 3 Bing. N. C. 835; Tomlinson *v.* Brittlebank, 1 Har. & W. 573.)

2 Van Tassel *v.* Capron, 1 Denio, 250.

3 Oakley *v.* Farrington, 1 Johns. Cas. 129; and held not actionable to say of a justice: "He is a logger-headed, a slouch-headed, and a bursen-bellied hound" (1 Keb. 629); or: "If he is a justice he is a rogue" (Rex *v.* Pocock, 2 Stra. 1158); but these words of a justice of the peace: "He is a damned fool of a justice" (Spiering *v.* Andrae, 45 Wis. 330); or, "G. perjured himself in deciding the case against me contrary to all law and evidence, &c. It is the damnedest erroneous decision I ever saw any justice give; it was a damned outrage, and was done in spite," held to impute a violation of plaintiff's judicial oath, and to be actionable *per se*. (Gove *v.* Blethen, 21 Minn. 80.) Calling one who is a cooper "varlet and knave" is not actionable—the words do not touch him in his trade. (Cotes *v.* Ketle, Cro. Jac. 204.) So saying of a land speculator, "He cheated me out of 100 acres of land," held not to touch him in his trade, and not actionable. (Fellowes *v.* Hunter, 20 Up. Can. Q. B. R. 382.) But the words: "You are a deceitful rascal, villain, and liar; I would not trust you with an auctioneer's license. You robbed a man you called your friend, and not satisfied with £10, you robbed him of £20 a fortnight ago," spoken of an auctioneer, held actionable. (Ramsdale *v.* Greenacre, 1 Fos. & F. 61.)

signs of life. Coroner Purdy was notified. Every one pronounced him dead—frozen to death. Coroner Purdy summoned a jury, and began to inquire according to law how the man came to his death. Dr. Lester looked at the supposed remains, and after a careful examination said the man was alive. They laughed at him, but he insisted; the body was removed, the inquest was interrupted, and perhaps a funeral averted. Under the treatment of Dr. Lester the man was restored to consciousness, and it was stated he had to thank Dr. Lester for not being buried alive. Held that the words did not touch plaintiff in his character of a physician, and were not actionable.[1] For a like reason it was held not actionable to say of one who kept a public garden, "He is a desperate man, a dangerous man. I am afraid to go to his house alone; I am afraid of my life;"[2] and these words of a pork butcher, "Who stole F.'s pigs? You did, you thief; you poisoned them with mustard and brimstone," were, after verdict, held not to have any necessary connection with his trade, and were not calculated to injure him in it, and therefore not actionable.[3] The words, "He has defrauded his creditors, and been horsewhipped off the course at D.," spoken of an attorney, but not in his character of an attorney, held not actionable.[4] And the same decision was made in reference to these words spoken of an attorney: "I have taken out a judge's order to tax A.'s bill; I will bring him to book, and have him struck off the roll."[5] "I will take him to Bow street on a charge of forgery."[6] And saying

[1] Purdy *v.* Rochester Print. Co. 96 N. Y. 272.

[2] Ireland *v.* McGarvish, 1 Sandf. Superior Ct. 155.

[3] Sibley *v.* Tomlins, 4 Tyrw. 90. The jury found that the words were not intended to impute felony.

[4] Doyley *v.* Roberts, 3 Bing. N. C. 835.

[5] Phillips *v.* Jansen, 2 Esp. Cas. 624. A charge against an attorney of having altered a promissory note, with an innuendo that plaintiff was guilty of disreputable practice, was, *on demurrer*, held actionable. (Warton *v.* Searing, 1 Vict. Law Rep. 122.) The court added, it was very difficult since statute 28 Vict. to sustain a demurrer to a declaration.

[6] Harrison *v.* King, 4 Price, 46; 7 Taunt. 431.

of a livery-stable keeper, "You are a regular prover under bankruptcy; you are a regular bankrupt maker; if it was not for some of your neighbors, your shop would look queer," was held not to be a charge in the way of his trade, nor actionable.[1] Where words imputing incontinency, and not in themselves actionable, were spoken of one in respect of his situation as clerk in a gas company, held that not imputing any misconduct in his capacity of clerk, they were not actionable.[2] A charge against the plaintiff, said to be spoken of him in his trade of a stay-maker, of criminal intercourse with a female employed by him in his trade, held not to affect him in his trade, and not actionable.[3] And so it was held that a charge of adultery against a physician did not *necessarily* touch him in his profession, and was not actionable without its being shown that the charge was connected with the plaintiff's profession;[4] and the same was held of these words of a physician: "He is so steady drunk he cannot get business any more;"[5] or, "he is a two-penny bleeder;"[6] or, "he gave my child too much mercury;" or, "he made up the medicines wrong through jealousy, because I would not allow him to use his own judgment."[7] Saying of a woman who gained her livelihood by teaching girls to dance, "She is as much a man as I am; she got I. S. with child; she is an hermaphrodite," was held not actionable, no special damage being properly alleged, and because girls

[1] Alexander *v.* Angle, 1 Cr. & J. 143; 1 Tyrw. 9; 7 Bing. 123.

[2] Lumby *v.* Allday, 1 Cr. & J. 301; 1 Tyrw. 217. The words were: "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores."

[3] Brayne *v.* Cooper, 5 M. & W. 249.

[4] Ayre *v.* Craven, 2 Adol. & El. 2; 4 Nev. & M. 220. In Parrett *v.* Carpenter (Noy, 64), it was held not actionable *per se* to charge a clergyman with adultery; but that case, it was said in Gallwey *v.* Marshall (9 Ex. 294), has been overruled; and saying of a clergyman that he had two wives was held actionable. (Nicholson *v.* Lyne, Cro. Eliz. 94; see § 195, *post.*) Charge of drunkenness against a minister (*ante*, p. 199, note 7).

[5] Anon. 1 Ham. 83, note.

[6] Foster *v.* Small, 3 Whart. 138.

[7] Edsall *v.* Russell, 4 M. & G. 1090.

are taught to dance as frequently by men as by women.[1] It was held actionable to call a schoolmistress a dirty slut,[2] or with being insane,[3] or to charge by writing a school-teacher with making a false report to the school visitors, and with general untruthfulness,[4] or with want of chastity.[5] It was held actionable to say of a shop-keeper, he had nothing but rotten goods in his shop;[6] or of a druggist he sold counterfeit Harlaem oil;[7] or to charge a person with selling milk which is impure by reason of the fact that a diseased horse is allowed to run in the pasture with his cows, is libelous *per se*, if it appears that the impurity is a necessary consequence of the facts respecting the horse, as it charges him with a misdemeanor;[8] or to charge in writing that the place of business of a trader (a coach-builder) was not respectable;[9] or, that a ship of which the plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not seaworthy, and that Jews had bought her to take out convicts.[10] Say-

[1] Wetherhead *v.* Armitage, 2 Lev. 233. In Malone *v.* Stewart (15 Ohio, 319), it was held actionable to call a married woman an hermaphrodite.

[2] Wilson *v.* Runyon, Wright, 651. To charge that a school teacher has shown herself tricky and unreliable, and destitute of the first requirements of a teacher, held actionable. (Allen *v.* Dixon, 34 Alb. L. J. 57; s. c. Dixon *v.* Allen, 69 Cal. 527.)

[3] Morgan *v.* Lingen, 8 Law Times, N. S. 800. See *ante*, p. 209, notes 7 and 8.

[4] Lindley *v.* Horton, 27 Conn. 58.

[5] Bodwell *v.* Osgood, 3 Pick. 379.

[6] Burnett *v.* Wells, 12 Mod. 420; see §§ 204, 205, *post*.

[7] Kimm *v.* Steketee, 48 Mich. 322.

[8] Brooks *v.* Harrison, 91 N. Y. 83.

[9] Barrett *v.* Long, 3 Ho. Lords Cas. 395.

[10] Ingram *v.* Lawson, 6 Bing. N. C. 212; 8 Sc. 775. The words were held to be more than a libel on the ship, and to constitute a libel on the plaintiff in his trade, for which he might recover without proof of malice or special damage. Defendant having published concerning an article manufactured by plaintiffs ("The bag of bags"), that its name was "very silly, very slangy, and very vulgar," and that "it has been forced upon the notice of the public *ad nauseam;*" this was charged as a libel on plaintiffs in their business, and as the manufacturers and sellers of said article. On demurrer to the declaration, held by Mellor and Hannen, JJ., that whether or not there was an imputation upon the plaintiffs was for the jury, and overruled the demurrer; held by Lush, J., that the demurrer was well taken, and that there was no cause of action disclosed by the declaration. (Jenner *v.* A'Beckett, 25 Law Times, N. S. 464.) See *post*, note to § 248.

ing of an innkeeper, "You have stolen goods in your house, and you know it," held not actionable.[1]

§ 191. In those trades or professions in which, ordinarily, credit is essential to their successful prosecution, their language is actionable *per se* which imputes to one in any such trade or profession, a want of credit[2] or responsibility or insolvency, past, present, or future;[3] as to say of a tradesman, He is not able to pay his debts; or, He owes more than he is worth;[4] he will break shortly.[5] He is

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[1] Because not equivalent to a charge of concealing stolen goods. Patterson *v.* Collins, 11 Up. Can. Q. B. 63; and see *ante*, note 6, p. 193.

[2] Defendant wrote to a dealer, For the purpose of giving a correct standing upon our Commercial Register of N. (plaintiff, a merchant) we would ask you in confidence if you are selling him and to what extent he is indebted to you, held not to impute a want of credit and not actionable. (Newell *v.* How, 31 Minn. 235.)

Defendant published what he designated a daily list of changes, containing a list of transfers of property, chattel mortgage, etc., and under the head of "chattels" were the words, "Newbold & Sons [plaintiffs] to J. R. Burns." For this publication plaintiffs sued, alleging special damage, held the publication, although untrue, was not actionable *per se*, and no proof could be given of general damage. (Newbold *v.* Bradstreet, 57 Md. 38.) See note to § 197, *post*, and § 229.

[3] Leycroft *v.* Dunker, Cro. Car. 317; Harrison *v.* Thornborough, 10 Mod. 196; Southam *v.* Allen, T. Raym. 231; Sewall *v.* Catlin, 3 Wend. 291; Read *v.* Hudson, 1 Ld. Raym. 610; Ostrom *v.* Calkins, 5 Wend. 263; Davis *v.* Lewis, 7 T. R. 17; Dobson *v.* Thornistone,, 3 Mod. 112; Chapman *v.* Lamphire, 3 Mod. 155; Mott *v.* Comstock, 7 Cow. 654; Whittaker *v.* Bradley, 7 D. & R. 649; s. c. Whittington *v.* Gladwin, 5 B. & C. 180; 2 C. & P. 146; Lewis *v.* Hawley, 2 Day [Conn.], 495; Anon. Lofft, 322; Hull *v.* Smith, 1 M. & S. 287; Else *v.* Ferris, Anthon, 36; Brown *v.* Smith, 13 C. B. 596; Jones *v.* Littler, 7 M. & W. 423; Carpenter *v.* Dennis, 3 Sandf. 305; Phillips *v.* Hoefer, 1 Penn. St. 62; Prettyman *v.* Shockley, 4 Harring. 112; Griffiths *v.* Lewis, 15 Law Jour. Q. B. 249; Erber *v.* Dun, 12 Fed. Rep. 527. Defendant published a periodical which, among other things, contained a heading, "Dissolutions of partnership," also a heading, "Meetings of creditors under bankrupt act." Under each heading was a list intended to be the one of the names of firms dissolved, and the other of the names of bankrupts as to whose estates meetings were to be held. The plaintiff's firm had been dissolved, and the name of the firm by mistake, was put in the list under the head of "Meetings of creditors,"—held actionable. (Shepheard *v.* Whittaker, L. R. 10 C. P. 502.) See also Stubbs *v.* Marsh, 15 Law Times, 312, and in note to § 329, *post*.

[4] Vin. Abr. Act. for Words, U, *a*, 11, 12, 13, 20, 21, and to publish in writing concerning one engaged in business in which credit was essential, "Had to hold over a few days for the accommodation of L." [plaintiff]. (Lewis *v.* Chapman, 19 Barb. 252; s. c. 16 N. Y. 369; and see Robinson *v.* Merchant, 7 Q. B. 918; Marzetti *v.* Williams, 1 B. & Ad. 415.)

[5] Hill's Case, Lat. 114; Dobson *v.* Thornistone, 3 Mod. 112. He is *off*, of a merchant, actionable without an innuendo. (Black *v.* Holmes, 1 Fox & Sm. 28.)

a pitiful fellow and a rogue; he compounded his debts at 5*s.* in the pound.[1] He is indebted to me and if he does not come and make terms with me, I will make a bankrupt of him and ruin him.[2] He is a bankrupt.[3] He was a bankrupt.[4] He is a bankrupt, and unable to pay his just debts.[5] The sheriff will sell him out one of these days, and claims against him not sued will be lost.[6] He must fail; his time is come.[7] He is not worth a penny and will run away.[8] He will be a bankrupt.[9] He is next door to breaking.[10] He is broken and run away, and will never return.[11] I heard he was run away.[12] You are a defaulter.[13] I have heard of no failures, but understand there is trouble with S.[14] Two dyers are gone off, and for

[1] Spoken of a pawnbroker, and special damage alleged. (Stanton *v.* Smith, 2 Ld. Raym. 1480.) This case was questioned (3 Bing. N. C. 840), but sustained. (Jones *v.* Littler, 7 M. & W. 423.)

[2] Brown *v.* Smith, 13 C. B. 596.

[3] Spoken of a grazier. (Anon. 1 Bulst. 40.) Of a dyer. (Squire *v.* Johns, Cro. Jac. 558.) Of a shoemaker, who bought and sold leather. (Stanley *v.* Osbaston, Cro. Eliz. 268; and see Vin. Abr. Act. for Words, U, *a*, 18, 19, 35, 36, 38, I, *a*.)

[4] Hall *v.* Smith, 1 M. & S. 287.

[5] Spoken of a drover, whose business was to purchase droves of cattle and drive them to market and sell them. (Lewis *v.* Hawley, 2 Day [Conn.], 495.) An innkeeper is a trader. (Ombony *v.* Jones, 19 N. Y. 241.) The words, "You have been a pauper ever since you have lived in the parish; you are now a pauper. I have paid £20 a year towards your maintenance; you will be in the bankrupt list in less than twelve months," spoken of an innkeeper, held actionable. (Whittington *v.* Gladwin, 5 B. & C. 180; 2 Car. & P. 146; s. c. Whittaker *v.* Bradley, 7 D. & R. 649.) So it is actionable to say of an innkeeper, He is broke, and there is neither entertainment for man nor horse. (Southam *v.* Allen, T. Raym. 231), or to say, He kept no accommodations, and a person could not get a decent meal or a decent bed in his house. (Trimmer *v.* Hiscock, 27 Hun, 364.) See Wallace *v.* Bennett, 1 Abb. N. C. 478.

[6] Spoken of a farmer. (Phillips *v.* Hoeffer, 1 Penn. St. 62.)

[7] Spoken of a distiller, the course of whose business was to purchase grain on credit. (Ostrom *v.* Calkins, 5 Wend. 263.)

[8] Anon, Lofft, 322. He is about to run away and defraud his creditors. (Prettyman *v.* Shockley, 4 Harring. 112.)

[9] In *three days*. (Thompson *v.* Twenge, 2 Rolle R. 423.) Or in six months. (Else *v.* Ferris, Anthon N. P. 36.) He will be a bankrupt, without saying when, said not to be actionable. (Vin. Abr. Act. for Words, O, *a*.)

[10] Spoken of a laceman (a dealer in lace). (Read *v.* Hutson, 1 Ld. Raym. 610.)

[11] Spoken of a carpenter. (Chapman *v.* Lamphire, 3 Mod. 155.) And spoken of a farmer. (Dobson *v.* Thornistone, 3 Mod. 112.) To say of a merchant, he is broke, is actionable. (Leycroft *v.* Dunker, Cro. Car. 317.)

[12] Spoken of a tailor. (Davis *v.* Lewis, 7 Term R. 17.) Spoken of a carpenter. (3 Mod. 312.)

[13] Noeninger *v.* Vogt, 88 Mo. 589.

[14] Spoken of a merchant. (Sewall *v.* Catlin, 3 Wend. 291.) To say of a

o, within this time twelve
; M. [plaintiff] is unable
erchant from Hamburgh.[3]
are many merchants who
otherwise of V.[4] There
put you through, but you
il before I have a chance.[5]
not worth a groat.[6] They
B.'s wife [J. B. being one
ly for a divorce, and that
of his hands; if so their
here the defendant said of
p and in the presence of
olesale dealers had closed
ere going to shut him up
olvent or likely to be so);
whether the words had the
declaration, and if so, they
le to say of a trader that
But held not actionable to
to get your bills met by
ted a chattel mortgage.[11]

[9] Rolin *v.* Steward, 14 C. B. 595; and see *ante* in note, p. 2. Words in relation to the credit of a shareholder in the joint stock of a boat, held actionable, special damage being shown, and there being a *colloquium* respecting plaintiff as such stockholder, and that it was a business requiring credit. (Turner *v.* Foxall, 2 Cr. M. & R. 324.)

[10] Daines *v.* Hartley, 3 Ex. 200. "Do you see that man? beware of him, for he has given me a good deal of trouble." These words spoken of a stock broker, and laid with an innuendo meaning that plaintiff was unworthy of trust, were held not actionable. (Moorhead *v.* Brown, 4 Wyatt, Webb & A'Beckett, 142.)

[11] Newbold *v.* J. M. Bradstreet Co. 2 Md. 38. Where a "daily notifica-

§ 192. Language of one in his trade or profession is actionable *per se* when it imputes to him fraud, want of integrity, or misconduct in the line of his business or profession "whereby he gains his bread."[1] Thus it was held actionable to say of a lawyer, He is a shyster,[2] or unworthy of trust,[3] or of a weaver, He is a rogue and villain, and taketh the goods of his customers and pawneth them, and he is not a man to be trusted;[4] of an auctioneer and appraiser, He is a damned rascal, and has cheated me out of £100 on the valuation;[5] of a trader, He was guilty of dishonestly using old materials instead of new in doing a certain

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tion sheet" issued by a mercantile agency contained the name of plaintiff and opposite thereto the words, "call at office," it rests with the jury, in view of the definition of a libel, and considering all the evidence adduced and relating to these words to determine whether they constitute a libel on the plaintiff in their business as merchants. (Erber *v.* Dun, 12 Fed. R. 527.) In New York where such a sheet had the words, "Canandaigua, Kingsbury, Sherman Gro. * * " and at the foot of the page, "* * For explanation please call at our office," it was held not libelous and not ambiguous, so as to admit testimony as to the effect of the words on creditors of plaintiff. That the *asterisks* were merely put as references to the foot note. (Kingsbury *v.* Bradstreet Co. 35 Hun, 16.)

[1] Babonneau *v.* Farrell, 15 C. B. 360; Bryant *v.* Loxton, 11 Moore, 344; Davis *v.* Davis, 1 Nott & McCord, 290; Chipman *v.* Cook, 2 Tyler, 456; Rush *v.* Cavenaugh, 2 Barr, 187; Brown *v.* Mims, 2 Rep. Con. Ct. 235; Foot *v.* Brown, 8 Johns. 50; Riggs *v.* Dennison, 3 Johns. Cas. 198; Thomas *v.* Jackson, 3 Bing. 104; 10 Moore, 425; Odiorne *v.* Bacon, 6 Cush. 185; Gay *v.* Homer, 13 Pick. 535; Ludwell *v.* Hole, 2 Ld. Raym. 1417; Davis *v.* Miller, 2 Strange, 1169; Obaugh *v.* Finn, 4 Pike (Ark.), 110; Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. P. C. 210; Sempsey *v.* Levy, 2 Jur. 776; Vin. Abr. Act. for Words, U, *a*, 25, 26. "Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable." (Fowles *v.* Bowen, 30 N. Y. 24.) "Thou hast received money of the king to buy new saddles, and has cozened the king and bought old saddles," actionable. (Greenfield's Case, Mar. 82; 1 Vin. Abr. 465, pl. 19.) Defendant published in a newspaper concerning plaintiff, a boarding-house keeper: "6 East 34th street.—Boarding. Applicants before locating here, inform yourselves as to table, attention, and characteristics of proprietors." There was no inducement nor allegation of special damage, and held not actionable. (Wallace *v.* Bennett, 1 Abb.N. C. 478.)

[2] Gribble *v.* Pioneer Press Co. 34 Minn. 342.

[3] Sanderson *v.* Caldwell, 45 N. Y. 398; Ludwig *v.* Cramer, 53 Wis. 193; Andrews *v.* Wilson, 3 Kerr (New Bruns.), 86.

[4] Vin. Abr. Act. for Words, U, *a*, 4. To say of a house painter, He is the greatest blackguard in Melbourne, and is not fit to be trusted in any house, held actionable. (Harris *v.* Pritchard, Melbourne Argus Rep. 29th June, 1857.)

[5] Bryant *v.* Loxton, 11 Moore, 344.

piece of work,[1] or of giving short measure,[2] of a corn-factor, You are a rogue and a swindling rascal; you delivered me one hundred bushels of oats worse by six pence a bushel than I bargained for;[3] of a lime-burner, He is a cheating knave;[4] of a bailiff, You did cozen your master of a bushel of barley, or, he hath deceived his master by buying and selling;[5] of a butcher, that he used false weights,[6] or sells unwholesome meat;[7] of a shipmaster, that he sold the consignment and pocketed the proceeds;[8] of a jeweler, He is a cozening knave in selling me a sapphire for a diamond;[9] of a goldsmith, He sold me a chain of copper for gold; of one who sold chamois skins, He will cozen you and sell you lamb skins instead of chamois skins; of a brewer, that he makes or sells unwholesome beer; of a tradesman, that he adulterates the article in which he deals; of one who took children to board, that he starved a child intrusted to his care;[10] of a shipmaster, "he sold the consignment of the ship Rising Sun, and pocketed the money."[11] Both the plaintiff and defendant

[1] Babonneau *v.* Farrell, 15 C. B. 360.

[2] White *v.* Cheesbro, 16 Week. Dig. 186.

[3] Thomas *v.* Jackson, 3 Bing. 104; 10 Moore, 425. And to charge a merchant with being a swindler is actionable. (Herr *v.* Bamberg, 10 How. Pr. R. 128.) So of a bank director. (Forest *v.* Hanson, 1 Cranch Cir. C. Rep. 63; notes 4 and 8, p. 207, *ante.*)

[4] Terry *v.* Hooper, 1 Ld. Raym. 87; 1 Lev. 115.

[5] Vin. Abr. Act. for Words, U, *a*, 5; and note 8, p. 181, *ante.*

[6] Griffiths *v.* Lewis, 15 Law Jour. 249, Q. B.; and see Prior *v.* Wilson, 1 C. B. N. S. 95. The way in which Messrs. P. (the plaintiffs) do things at Guilford—inserting the wedge—innuendo inserting a wedge to falsify the weight.

[7] Young *v.* Kuhn, 9 So. West. Rep. 860. Selling tainted food is a criminal offense in New York. Penal Code, § 408.

[8] Orr *v.* Skofield, 56 Me. 483.

[9] Vin. Abr. Act. for Words, I, *a*, 9, and several cases there referred to.

[10] Vin. Abr. Act. for Words, U, *a*, 27, 28, 29, 30, 31; Nuton's Case, Freem. 25. Charging a brewer with filthy and disgusting practices in preparing his malt, is actionable. (White *v.* Delavan, 17 Wend. 49; Ryckman *v.* Delavan, 25 Wend. 186.) See Wood *v.* Brown, 1 C. Marsh. 522; 6 Taunt. 169. In that case, a declaration which alleged that defendant published of plaintiff, a brewer, that his beer was of a bad quality and sold by deficient measure, was held bad on general demurrer, because the words were not set out in *hæc verba*, but it was merely alleged that the defendant published words *purporting* that plaintiff, &c.

[11] Orr *v.* Skofield, 56 Me. 483.

carried on the business of tailors. Plaintiff, in company with A., went to defendant's store to purchase material with which to make trowsers for A. Defendant said to A., Don't have anything to do with that man [plaintiff], he will rob you, he is a rogue. Defendant also asked A. to allow him [defendant] to make the trowsers. On the trial, the judge directed the jury that the words were actionable if spoken of the plaintiff in the way of his trade, and the jury having found for the plaintiff, the verdict was sustained in *banc.*[1] And actionable to charge the agent of a stage company, that he [plaintiff] and B., his sub-agent, had altered way-bills and books to screen the plaintiff [innuendo charging forgery], and that plaintiff and B. were together to cheat the company, and they would cheat them out of more than the company can make.[2] Actionable to charge, by writing, a steamboat agent with being an impertinent person and withholding newspapers intrusted to him for the defendants.[3] And it was held actionable to publish orally of a land surveyor, who surveyed by mathematics, as distinguished from one who measured with a pole, He is a cozening and shifting and a cheating knave; and it was said that the same words of a shoemaker, a butcher, or a baker, would not be actionable, because the goodness or deceit of their wares may be discerned by the eye, but deceit in land measuring could be discovered only by persons skilled in the art;[4] but not actionable to say of a workman, He has received forty days' wages for work that might have been done in ten days, and is a rogue for his pains;[5] nor to say of a smith, Thou art a cozening rogue, and in one tire of wheels which

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[1] Sloman *v.* Chisholm, 22 Up. Can. Q. B. 20.

[2] Gay *v.* Homer, 13 Pick. 535.

[3] Keemle *v.* Sass, 12 Mo. 499. The language, being published in writing, was actionable as concerning the plaintiff as an individual merely.

[4] Blunden *v.* Eustace, Cro. Jac. 504; London *v.* Eastgate, 2 Rolle R. 72.

[5] Lancaster *v.* French, 2 Stra. 797.

thou didst send to J. S. thou didst cozen him of a noble; for the words import he cozened in the price only, and not in the ill-making of the wheels. And for saying of men in trade who sell things, that they cozen in the price, is no disgrace, for every trader cozens in the price when he sells for more than the thing is worth.[1] Actionable to publish orally of a merchant's clerk, that he [plaintiff] had become such a notorious liar that he [defendant] could place no confidence in him; that he had strong reason to doubt his honesty, and had written S. to employ an officer to watch him.[2] Actionable to publish orally of a merchant that he is a villain, a rascal and a cheater.[3] And the following words spoken of the plaintiff as clerk of the firm of defendant and his partner, "Your man [plaintiff] is plotting to blow me [defendant] and the concern [said firm] up," were held actionable.[4] So it has been held actionable to publish orally of an attorney, He is a blackmailer;[5] he is a forging rogue,[6] a cheat,[7] a damned rascal;[8] he will play on both sides, or he deals on both sides,[9] a bribing knave, and has taken twenty pounds of you to cozen me;[10] he is not a man of integrity, and is not to be trusted; he will take a fee on both sides;[11] he is a cheater, I will have him barred of his practice;[12] he deserves to be struck off the roll;[13] he is a false knave, a cozening knave, and has gotten

[1] Vin. Abr. Act. for Words, S, *a*, 24. Thou didst cozen a woman of her goods, held not actionable. (Engurst *v.* Browne, Cro. Eliz. 99.) And held not actionable to say of an innkeeper, He is a caterpillar, and lives by *robbing* his guests. Robbing not construed feloniously. (Vin. Abr. Act. for Words, U, *a*, 34; *ante*, § 144, subd. *s*.)

[2] Fowles *v.* Bowen, 30 N. Y. 20; and see Brown *v.* Orvis, 6 How. Pr. R. 378. Where the words affect one as merchant's clerk, special damage need not be alleged. (Butler *v.* Howes, 7 Cal. 87.)

[3] Nelson *v.* Borchenius, 52 Ill. 236.

[4] Ware *v.* Clowney, 24 Ala. 707.

[5] Healy *v.* Dettra, 7 Cent. Rep. 168.

[6] Anon. 1 Comyn R. 262.

[7] Rush *v.* Cavenaugh, 2 Barr, 187.

[8] Brown *v.* Mims, 2 Rep. Con. Ct. 235.

[9] Brown *v.* Hook, Brownl. 5; Vin. Abr. Act. for Words, S, *a*, 2, 4; Shire *v.* King, Yelv. 32; S. C. King *v.* Shore, Cro. Eliz. 914.

[10] Yardley *v.* Ellis, Hobart, 8, *a*; 1 Rolle R. 53.

[11] Chipman *v.* Cook, 2 Tyler, 456.

[12] Taylor *v.* Starkey, Cro. Car. 192.

[13] *Dictum*, Phillips *v.* Jansen, 2 Esp. 624.

all that he has by cozenage; he has cozened all those that have dealt with him; he arresteth without taking out writs; he is a knave in his practice;[1] he offered himself as a witness to divulge the secrets of his clients;[2] he is a rogue for taking your money, and has done nothing for it; he has not entered an appearance for you; he is no attorney at law, he don't care to appear before a judge; what signifies going to him, he is only an attorney's clerk and a rogue, he is no attorney.[3] Is M. your attorney? . . . He will overthrow your cause.[4] I marvel you will employ such a knave as Nicholls, you will have but disgrace by it; he is a proclaimed knave;[5] he is the falsest knave in England;[6] he is a base rogue, and maintains his family by his knavery;[7] he is an extortioner, and cozened A. in a bill of costs;[8] he keepeth many markets and stirreth up men to suits, and promises if he do not recover in their cause he will take no charges, and he once promised me that if he did not recover in a cause he would take no charges of me, yet he afterwards took charges of me;[9] he deserves to have his ears nailed to the pillory.[10] Thou art a paltry fellow; thy credit is fallen, for thou dealest on both sides, and dost deceive many that trust thee.[11] He suppressed a will;[12] he is a cozener, and hath cozened me of twenty shillings.[13] He is a cozener, and cozened his clients, and for that cause was discharged the court.[14] He is a base, cheating, cozening knave, and hath cheated me as never any man was cheated.[15] He took, corruptly,

[1] Jenkins *v.* Smith, Cro. Jac. 586; Bell *v.* Thatcher, Freeman, 277.
[2] Riggs *v.* Denniston, 3 Johns. Cas. 198.
[3] Hardwick *v.* Chandler, 2 Str. 1138.
[4] Martyn *v.* Burlings, Cro. Eliz. 589; Golds. 128.
[5] Webb *v.* Nicholls, Cro. Car. 459.
[6] Anon. F. Moore, 61; Dal. 63.
[7] Shaw *v.* Wakeman, Vin. Abr. Act. for Words, S, *a*, 2.
[8] Stanley *v.* Boswel, Cro. Eliz. 603.
[9] Smith *v.* Andrews, Sty. 183.
[10] Jenkinson *v.* Wray, F. Moore, 401.
[11] Shire *v.* King, Yelv. 32; S. C. King *v.* Shore, Cro. Eliz. 914.
[12] Godfrey *v.* Owen, Palm. 21.
[13] Litman *v.* West, Het. 123.
[14] Mead *v.* Perkins, Cro. Car. 261.
[15] Jeffryes *v.* Payhem, Cro. Car. 510.

five marks of B. T., being against his own client, for putting off an assize against him.[1] Thou art a common barrator, a Judas, a promoter.[2] He sets people together by the ears, and we shall have him indicted for a common barrator.[3] You are a knave; you were attorney for my mother against my husband, and set her on to sue him, and made him spend £1,000, and such knaves as you are have made my husband spend almost all his estate.[4] And actionable to say of a counsellor, "He will deceive you; he revealed the secrets of my cause."[5] It is actionable to publish in writing of an attorney employed to defend a prisoner, that on the trial he sent important witnesses away without the knowledge of his client or of counsel;[6] or that he has been reprimanded for sharp practice.[7] "I was so incensed with that girl [plaintiff] for coming to hire with me, after having had a miscarriage at Mrs. B.'s house, and she afterwards to give the girl a good discharge." These words spoken of a domestic servant, held actionable *per se*.[8]

§ 193. Language of one in a business or profession, which imputes to him ignorance generally in his business or profession, or such ignorance or other incapacity as unfits him for its proper exercise, is actionable;[9] as to say of a physician or an apothecary, "It is a world of blood he has to answer for in this town through his ignorance; he did kill a woman and two children. He was the death of

[1] Smayles *v.* Smith, Brownl. 1.
[2] Taylor *v.* Starkey, Cro. Car. 192.
[3] Annison *v.* Blofield, Carth. 848.
[4] Hilton *v.* Playters, All. 13.
[5] Snag *v.* Gray, March's Sland. 63.
[6] Sanford *v.* Bennett, 24 N. Y. 20.
[7] Boydell *v.* Jones, 4 M. & W. 446. Held not actionable to say orally of an attorney, "He is a paltry lawyer" (Rich *v.* Holt, Cro. Jac. 267); but actionable to say orally, "He is a pettifogging, blood-sucking attorney." (Armstrong *v.* Jordan, Carlisle Assizes, 1826.)
[8] Connors *v.* Justice, 13 Ir. L. R. N. S. 451; 7 Ir. Jur. N. S. 319.
[9] Jones *v.* Powell, 1 Mod. 272; Peard *v.* Jones, Cro. Car. 382; Camp *v.* Martin, 23 Conn. 86; Day *v.* Buller, 3 Wils. 59; Garr *v.* Selden, 6 Barb. 416. To write of an architect that he has had no experience in certain work he had been employed to perform, held actionable. (Botterell *v.* Whytehead, 41 L. T. N. S. 588.)

J. P.; he killed his patient with physic;"[1] or, "Dr. A. killed my children; he gave them teaspoon doses of calomel, and it killed them. . . . They died right off the same day;"[2] or, "He has killed the child by giving it too much calomel;"[3] or, "He has killed six children in one year;"[4] or, "He is a drunken fool and an ass, he never was a scholar;"[5] or, "I wonder you had him to attend you; do you know him? He is not an apothecary; he has not passed any examination; he is a bad character, none of the medical men here will meet him; several have died that he has attended, and there have been inquests held upon them;"[6] or, "He killed my child, it was the saline injection that did it;"[7] or, "He is an empirick and a mountebank;"[8] or, "a quack;"[9] or, "He is a quack, and if he shows you a diploma it is a forgery;"[10] or, "His treatment of a patient was rascally;"[11] and so it has been held actionable to say of a midwife: "Many have perished for want of her skill" (*i. e.*, for her want of skill)[12]

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[1] Tutty *v.* Alewin, 11 Mod. 221; and see note 1, p. 180, *ante*.

[2] Secor *v.* Harris, 18 Barb. 425.

[3] Johnson *v.* Robertson, 8 Porter, 486; see dictum March *v.* Davison, 9 Paige, 580. To charge a physician with having killed a patient with physic, held not actionable. (Poe *v.* Mondford, Cro. Eliz. 620.) "In my opinion, the bitters that A. [plaintiff, a physician] fixed for B. [his patient] were the cause of his death," held not actionable; but the words, "The bitters that Dr. J. [plaintiff] gave John Smith caused his death: there was poison enough in them to kill ten men," held actionable. (Jones *v.* Diver, 22 Ind. 184.) Charging malpractice. (Rogers *v.* Kline, 56 Miss. 808; 31 Amer. Rep. 389.)

[4] Carroll *v*, White, 33 Barb. 615.

[5] Cawdrey *v.* Tetley, Godb. 441.

[6] Southee *v.* Denny, 1 Ex. 196; 17 Law Jour. R. 151, Ex. Alleging that a physician is not entitled to practice, as not being duly licensed, may be actionable. See Collins *v.* Carnegie, 3 Nev. & M. 703; 1 Ad. & El. 695. And charging a physician with being guilty of conduct derogatory to the character of a gentleman and of a medical man, held actionable. (Bailey *v.* Abercrombie, 3 Menzies' R. 33.)

[7] The words impute manslaughter. (Edsall *v.* Russell, 4 M. & G. 1090.)

[8] Vin. Abr. Act. for Words, S, *a*, 12. Publishing in writing of a barrister that he was a quack lawyer and a mountebank and an impostor, is actionable. (Wakley *v.* Healey, 7 C. B. 591.)

[9] Pickford *v.* Gutch, Dorchester Assizes, 1787; White *v.* Carroll, 42 N. Y. 161.

[10] Moises *v.* Thornton, 8 Term R. 303. "He is no doctor, he bought his diploma for fifty dollars." These words of a doctor held actionable *per se*. (Bergold *v.* Puchta, 2 Sup. Ct. R. [T. & C.] 532.)

[11] Camp *v.* Martin, 23 Conn. 86.

[12] Flower's Case, Cro. Car. 211. Charging a city physician, appointed

"She is an ignorant woman, and of small practice, and very unfortunate in her way; there are few she goes to but lie desperately ill, or die under her hands."[1] "She is no midwife but a nurse, and if I had not pulled her from Mrs. J. S., she had killed her and her child."[2] "She lays no woman, but Dr. Chamberlayn or his lady does her work."[3] And it has been held actionable to say of a school-master: "Put not your son to him, for he will come away as very a dunce as he went."[4] "He has no knowledge in grammar or in the Latin tongue, nor knows how to educate his scholars in the Latin tongue," with an allegation of loss of scholars.[5] So it has been held actionable to say of an attorney: "He hath no more law than Mr. C.'s bull, or than a goose;"[6] "He cannot *read* a declaration;"[7] "What, does he pretend to be a lawyer? He is no more of a lawyer than the devil;"[8] or of a barrister, "He is a dunce, and will get little by law, he was never but accounted a dunce;"[9] or of a shoemaker, that he is "a cobbler;"[10] or of a watchmaker, that "he knows not how to make a good watch."[11] Actionable to say of a mason, "He is no mechanic, he cannot make a good wall, or do a good job of plastering, he is no workman, he is a

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by the common council and not publicly elected, with causing death by malpractice, is actionable. (Foster *v.* Scripps, 39 Mich. 376.)

[1] Wharton *v.* Brook, Vent. 21; Wharton *v.* Clover, 2 Keb. 489.

[2] Whitehead *v.* Founes, Freem. 277.

[3] Gyles *v.* Bishop, Freem. 278.

[4] Het. 71.

[5] London *v.* Eastgate, 2 Rolle's R. 72.

[6] Baker *v.* Morfue, 1 Sid. 327.

[7] Jones *v.* Powel, 1 Mod. 272. It implies ignorance, not a defect of sight.

[8] Day *v.* Buller, 3 Wils. 59.

[9] Peard *v.* Jones, Cro. Car. 382.

[10] 1 Mod. 19; Vin. Abr. Act. for Words, U, *a*, 16.

[11] Redman *v.* Pyne, 1 Mod. 19; but to say of a watchmaker, he is a bungler, and knows not how to make a good piece of work, would be actionable. (*Id.*) Where A., the author of a work, sold the copyright to the defendant, who afterwards published a new edition as edited by A., containing mistakes and errors, held, if this was calculated to injure A.'s reputation as an author, he might maintain an action. (Archbold *v.* Sweet, 5 C. & P. 219; 1 M. & Rob. 162.)

botch;"[1] and actionable to write of an optician, he is "a licensed hawker and a quack in spectacle secrets."[2]

§ 194. It is not actionable to charge one in a business or profession with want of skill or ignorance in a particular transaction.[3] Thus it was held not to be actionable to say of an attorney in a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you."[4] It is said, however, that it is actionable to charge ignorance or unskillfulness, if it amounts to gross ignorance or unskillfulness.[5] This seems only another mode of imputing such ignorance as unfits the person for the proper exercise of his art, or with misconduct therein.

§ 195. It was held actionable to publish *orally* of a minister of the gospel, that he preaches lies in the pulpit;[6] he made a seditious sermon,[7] he hath two wives,[8]

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[1] Fitzgerald *v.* Redfield, 51 Barb. 484; 36 How. Pr. R. 97. To impute to one actually employed to do certain work, that he has no experience in such work, is a libel upon him in his calling, and it is no justification to say that such person cannot show any experience in work of the kind. (Botterill *v.* Whytehead, 41 L. T. N. S. 588.)

[2] Keyzor *v.* Newcomb, 1 Fost. & F. 559.

[3] Garr *v.* Selden, 6 Barb. 416; Camp *v.* Martin, 23 Conn. 86; Southee *v.* Denny, 1 Ex. 196; Lynde *v.* Johnson, 39 Hun, 5; Rodgers *v.* Kline, 56 Miss. 808. Jury to judge, how words used. See note 10, p. 241, *ante*.

[4] Foot *v.* Brown, 8 Johns. 64.

[5] Secor *v.* Harris, 18 Barb. 425; Lynde *v.* Johnson, 39 Hun, 5; and Sumner *v.* Utley, 7 Conn. 257; Johnson *v.* Robertson, 8 Port. 486; Camp *v.* Martin, 23 Conn. 86. Saying of a school-master, he is a habitual drunkard, would be actionable. (Brandrick *v.* Johnson, 1 Vict. Law Rep. 306.) A charge against a physician, although confined to his professional conduct in a single case, and imputing neither crime nor general professional incompetency, may, nevertheless, impute such gross, reckless and inhuman disregard for the life and health of his patient in that particular case as necessarily, or naturally and presumably, to injure his professional reputation. Such would be a report charging a physician with culpable neglect in allowing the decomposing body of a dead infant to remain several days in the room with the sick mother. (Pratt *v.* Pioneer Press Co. 35 Minn. 251.) [Was not this libelous independently of its affecting professional character.] And see Gauvreau *v.* Superior Pub. Co. 62 Wis. 403.

[6] Drake *v.* Drake, Sty. 363; and see Cranden *v.* Walden, 3 Lev. 17; Bishop of Norwich *v.* Pricket, Cro. Eliz. 1; Dod *v.* Robinson, Aleyn, 63; and Gallwey *v.* Marshall, 9 Ex. 294.

[7] Phillips *v.* Badby, 4 Coke, 19 *a*.

[8] Nicholson *v.* Lynes, Cro. Eliz. 94.

he is a drunkard,[1] or incontinent,[2] or guilty of incest,[3] or he has a bastard,[4] or he is a perjured priest.[5] The following words were held not actionable, spoken of one who was a minister at the time of the publication, and who had been a draper in partnership with H. P., and who had a controversy with H. P. as to the partnership accounts: "I do not go by reports, I go by a knowledge of facts. Mr. H. [the plaintiff] is a rogue, and I can prove him to be so by the books at S. He pretends to say he has been as good as a father to H. P., when, in fact, he has been robbing him. He has cheated P. of £2,000. I will so expose him that he will not be able to hold up his head in T. pulpit. . . . I wonder how any respectable person can countenance such a man by their presence. I have been advising some persons to go to the Wesleyan chapel, as they would hear plain, honest men."[6] So the following words, spoken of a clergyman, were held not actionable: "Dr. P. [plaintiff] placed before me a bill, I signed it; I do not know for what amount it was, for I was completely pigeoned by Dr. P." [plaintiff].[7] In the same case the fol-

[1] McMillan *v.* Birch, 1 Binn. 178; Chaddock *v.* Briggs, 13 Mass. 248; *contra*, see Buck *v.* Hersey, 31 Maine (1 Red.), 558; O'Hanlon *v.* Myers, 10 Rich. Law (So. Car.), 128. In Dod *v.* Robinson (Aleyn, 63), the words were: "You are a drunkard, a whoremaster, a common swearer and a common liar, and you have preached false doctrine, and deserve to be degraded." These words were held actionable.

[2] Demarest *v.* Haring, 6 Cow. 76. It seems that in England, to render such a charge actionable, the person affected must be beneficed, or in the actual receipt of professional emolument as a preacher, lecturer, or the like. (Gallwey *v.* Marshall, 9 Ex. 294; and see note 2, p. 196, *ante*.) Saying of a Methodist minister that he kept company with whores, held not actionable without special damage. (Breeze *v.* Sails, 23 Up. Can. Q. B. R. 94.)

[3] Spoken of a *paid* preacher or lay exhorter of the Methodist church. (Starr *v.* Gardner, 6 Up. Can. Q. B. R. O. S. 512.)

[4] Special damage being alleged. (Payne *v.* Beuremorris, 1 Lev. 248.) He is a lewd adulterer, and hath two children by the wife of O. S., spoken of a clergyman, held not actionable. (Parrett *v.* Carpenter, Noy, 64; and *ante*, note 4, p. 240.) And so of the words, You are an old rogue, rascal, and contemptible fellow. (Musgrove *v.* Bovey, 2 Stra. 946.)

[5] Hogg *v.* Vaughan, Sty. 6.

[6] Hopwood *v.* Thorn, 8 C. B. 293.

[7] Pemberton *v.* Colls, 10 Q. B. 461; 16 Law Jour. Q. B. 403. To charge a bishop with being a wicked man (Townsend *v.* Hughes, 2 Mod. 159), or a bankrupt, said to be actionable (Holt on Libel, 233, note); and held actionable to publish in writing that the plaintiff, a clergyman, had caused a misunderstanding in his con-

lowing words, spoken of a clergyman, held to touch him in his professional character, and to be actionable: "The very day I came into residence, Dr. P. [plaintiff] sent for me; I went and dined with him, and the wine must have been drugged, for I took but two glasses and was quite stupefied. While in this condition Dr. P. put a bill into my hands, and requested me to sign it, saying, C., just put your name to this; I wish to have it as security for the payment of £130 per annum for reading for you. I answered, Give me a pen and I will sign it. Immediately I had signed it, Dr. P. snatched it up and said, This will be quite safe. The bill, I think, was drawn for £2,500, but having been stupefied with the wine, I do not rightly remember. You cannot suppose I can meet a man who so cheated me at my first coming?" It is actionable to charge a Protestant archbishop with having sought, by means of a bribe, to induce a Romish priest to abandon his religious creed.[1] It was held not actionable to charge a Roman Catholic priest with having imposed certain penance, there being nothing to show that enjoining such penance affected his character as such priest.[2] To publish in writing of a clergyman that he came to the performance of divine service in a towering passion,[3] or that he desecrated a portion of the church by turning it into a cooking apartment,[4] held actionable.

§ 196. As regards language concerning one in an office, the same general principles apply as to language concerning one in trade. Language concerning one in office which imputes to him a want of integrity or misfeasance

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gregation by personal invectives from the pulpit against a young lady of spotless reputation. (Edwards *v.* Bell, 8 Moore, 467.)

[1] Tuam *v.* Robeson, 5 Bing. 17; 2 M. & P. 32.

[2] Hearne *v.* Stowell, 12 Adol. & El. 719.

[3] Walker *v.* Brogden, 19 C. B. N. S. 65.

[4] Kelly *v.* Sherlock, Law Rep. 1 Q. B. 686. Held not actionable to say of a minister of the gospel, He is a free negro. (McDowell *v.* Bowles, 8 Jones' Law [N. Car.], 184.)

in his office, or a want of capacity generally to fulfill the duties of his office, or which is calculated to diminish public confidence in him,[1] or charges him with a breach of some public trust, is actionable.[2] But as in the case of one in trade, the language, to be actionable, must touch him in his office.[3] To charge a judge with erring in judgment or disregarding public sentiment, or with any impropriety which would not furnish a cause of impeachment, is not actionable *per se;* but to charge that he had "abandoned the common principles of truth," or "lacked capacity as a judge," or made the office of clerk of his court a subject of private negotiation, is actionable *per se.*[4] So it is actionable *per se* to charge that a judge or notary improperly put his official signature to the jurat of a paper in the form of an affidavit,[5] or procured one to take a false oath,[6] or took a bribe,[7] or acted unjustly in his office,[8] or to charge that he is lewd or false,[9] or corrupt,[10] or partial,[11] or half-eared, and will hear but one side, or that he cannot hear of one ear,[12] or that he perverted justice,[13] or made use of his office

[1] Lansing *v.* Carpenter, 9 Wis. 540.

[2] Kinney *v.* Nash, 3 N. Y. 177, and authorities there referred to.

[3] McGuire *v.* Blair, 2 Law Reporter, 443, and *ante*, § 190. So that charging a justice with misfeasance in trying a cause not within his jurisdiction, was held not actionable as not affecting him as a justice. (Oram *v.* Franklin, 5 Blackf. 42; see, however, Carter *v.* Andrews, 16 Pick. 1; Stone *v.* Clark, 21 *Id.* 51.)

[4] Robbins *v.* Treadway, 2 J. J. Marsh. 540.

[5] Dollaway *v.* Turrell, 26 Wend. 383; 17 *Id.* 426; Henderson *v.* Com'l Adv. 12 N. Y. St. Rep. 649; 46 Hun, 504; affi'd 111 N. Y. 685.

[6] Chetwind *v.* Meeston, Cro. Jac. 308.

[7] Marriner *v.* Cotton, F. Moore, 695 In Lindsey *v.* Smith, 7 Johns. 360, an action was sustained for the words, "Lindsey had been feed by Abner Wood, and I could do nothing when the magistrate was in that way against me."

[8] I have often been with him for justice, but could never get any at his hands but injustice. (Isham *v.* York, Cro. Car. 15.) Actionable to say of a judge, his sentence was corruptly given. (See Chaddock *v.* Briggs, 13 Mass. 253; Chipman *v.* Cook, 2 Tyler, 456.)

[9] Wright *v.* Moorhouse, Cro. Eliz. 358.

[10] Cæsar *v.* Curseny, Cro. Eliz. 305. You are a rascal, a villain, and a liar, spoken of a magistrate in the execution of his office, the words import a charge of corruption. (Aston *v.* Blagrave, 1 Strange, 617; 2 Ld. Raym. 1369.) And so of the term rogue. (Kent *v.* Pocock, 2 Str. 1168.)

[11] Kemp *v.* Housgoe, Cro. Jac. 90.

[12] Masham *v.* Bridges, Cro. Car. 223, and Alleston *v.* Moor, Het. 167.

[13] De la Ware *v.* Pawlett, F. Moore, 409.

to worry one out of his estate,[1] or, He is forsworn and not fit to sit upon a bench,[2] or, He did seek my life and offered ten shillings to the under-sheriff to impanel a jury that might find me guilty.[3] But held not actionable to publish orally of a justice, He is a blood-sucker, and seeketh after blood; if a man will give him a couple of capons he will take them;[4] or, You robbed the poor and are worse than a highwayman.[5] It is not actionable to say of a mayor, He is a rogue and rascal;[6] or of an alderman, When he puts on his gown Satan enters it;[7] or of an under-sheriff, Thou didst serve an execution and keep in thy hands the money collected.[8] But it is actionable to charge a sheriff with malpractice in his office;[9] or to say of a constable, He is not worthy of his office, for he and his company, the last time he was constable, stole five of my swine and eat them;[10] or to publish in writing of a police officer that he had been guilty of blackmailing, and had been dismissed for that cause.[11] But held not actionable to publish orally of a police officer, "I saw a letter respecting an officer of the L. police, who had been guilty of conduct unfit for publication," there being no allegation of special damage

[1] Newton *v.* Stubbs, 3 Mod. 71.

[2] Carn *v.* Osgood, 1 Lev. 280; S. C. as Kerle *v.* Osgood, 1 Vent. 50; and see Pepper *v.* Gay, 2 Lutw. 1288; Stutley *v.* Bulhead, 4 Coke, 16 *a*, 19 *a;* Lassels *v.* Lassels, F. Moore, 401; Hollis *v.* Briscow, Cro. Jac. 58; Burton *v.* Tokin, Cro. Jac. 143; Beamond *v.* Hastings, Cro. Jac. 240.

[3] Bleverhassett *v.* Baspoole, Cro. Eliz. 313.

[4] Hilliard *v.* Constable, F. Moore, 418. Held actionable to publish in writing of a justice, that he had been chairman of a finance committee. and had audited accounts containing items nominally to furnish lodgings for the judges, but in reality for the accommodation of the magistrates; innuendo that plaintiff had conducted himself corruptly in his office of justice. (Adams *v.* Meredew, 3 Y. & J. 219, overruling S. C. 2 Y. & J. 417. This case was, it is said, carried to the House of Lords.)

[5] Palmer *v.* Edwards, Rep. of Cas. of Prac. in C. B. 160.

[6] Reg. *v.* Langley, 6 Mod. 125; 2 Salk. 697.

[7] 2 Starkie on Slander, 314.

[8] Geeve *v.* Copshil, Cro. Eliz. 854.

[9] Dole *v.* Van Rensselaer, 1 Johns. Cas. 330. Charging a sheriff or his deputy with making arrests merely to obtain fees, is actionable *per se*. (Bourreseau *v.* Detroit Ev. Jour. 63 Mich. 425.)

[10] Taylor *v.* How, Cro. Eliz. 861. Doubtful if actionable to say of a constable, Thou art a cozening knave, and hast cozened the parish in rates to £30. (Thomas' Case, Het. 36.)

[11] Edsall *v.* Brooks, 17 Abb. Pr. R. 221; 2 Robertson, 29.

and the charge not being connected with his official character.[1] It is actionable to publish orally of the director of a public company, that he had sold the property of the company and pocketed the money;[2] or of a town clerk acting as moderator of a town meeting, that he had fraudulently destroyed a vote;[3] or of an administrator, that he had been guilty of fraud in the appraisement of the estate of the decedent;[4] or of a juror that he agreed with another juror to determine the amount of damages to be given in a certain cause in which he acted as juror, by the result of a game of draughts.[5] A churchwarden holds a temporal office, and to charge him with cheating the parish is actionable.[6] It is actionable to publish in writing of a court commissioner, that he will act in his judicial office according to the views of the persons "whose tool and toady he is, and that the past would warrant the depriving him of his office;[7] of an overseer, that when out of office he advocated low rates, and that he [defendant] would not trust him [plaintiff] with £5 of his private property;[8] or of an overseer, that he had been guilty of illiberal and illegal practices towards paupers, in compelling them to procure goods from a particular person, and threatening him with

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[1] James *v.* Brook, 9 Q. B. 7; 16 Law Jour. Q. B. 17; 10 Jur. 541.

[2] Johnson *v.* Shields, 1 Dutcher, 116.

[3] Dodds *v.* Henry, 9 Mason, 262.

[4] Beck *v.* Stitzel, 21 Penn. St. R. (9 Harris) 522.

[5] Commonwealth *v.* Wright, 1 Cush. 46. The charge was in writing. Held actionable to publish orally of a juryman, Thou art a common juryman, and hast been the overthrow of one hundred men by thy false means. (Vin. Abr. Act. for Words, F, *a*, 23.) To publish that the verdict of a jury is "infamous" and "we cannot express the contempt which should be felt for these twelve men who have thus not only offended public opinion, but have done injustice to their own oaths," is actionable and any one of the jury may sue. (Byers *v.* Martin, 2 Colo. 605.)

[6] Townsend *v.* Barker, Sty. 394; Woodruff *v.* Wooley, Curt. 1; Strode *v.* Holmes, Sty. 338; and see Hutton *v.* Beech, Cro. Jac. 339; Hopton *v.* Baker, 2 Bulst. 218; Willis *v.* Shepherd, Cro. Jac. 619. To say of a churchwarden he diverted himself on Sunday, when he ought to have been in the house of God, held actionable as charging a breach of his duty as churchwarden. (Morris *v.* Bloxam, Ir. Term. Rep. 91.)

[7] Lansing *v.* Carpenter, 9 Wis. 540.

[8] The jury found that the words imputed dishonesty. (Cheese *v.* Scales, 10 M. & W. 488.)

the penalties of the act against such practices;[1] or of a postmaster, who resided in the house used as the post office, that the house in which the post office is kept is of such a low character that a decent lady dare not enter.[2] And actionable to publish orally of a postmaster that he opened a letter, took money out of it, and appropriated it to his own use, and kept and embezzled letters;[3] or that he would rob the mail for five hundred dollars—yes he would rob the mail for five dollars.[4] It is not actionable to charge a member of Parliament with want of sincerity;[5] or a member of the Legislature, in reference to the future discharge of his functions, with being a corrupt old tory.[6] It is actionable to publish in writing of a member of Congress, "He is a fawning sycophant, a misrepresentative in Congress, and a groveling office-seeker; he has abandoned his post in Congress in pursuit of an office;"[7] or of a lieutenant-governor, that he was in a beastly state of intoxication while in the discharge of his duty in the Senate, and was an object of loathing and disgust;[8] or a commissioner of bankrupts, with being a misanthropist, and violent partisan, stripping unfortunate debtors of every cent, and then depriving them of the benefits of the act.[9] In an action by G., a United States collector, for slander, the declaration charged these words: "G. has not account-

[1] Woodard *v.* Dowsing, 2 M. & Ry. 74.

[2] Johnson *v.* Stebbins, 5 Ind. (Porter) 364.

[3] Hays *v.* Allen, 3 Blackf. 408. See *contra*, McCuen *v.* Ludlam, 2 Harrison, 12, and notes 13, p. 194, and 5, p. 219, and 5, p. 173 *ante*, and Taylor *v.* Kneeland, 1 Doug. (Mich.) 67.

[4] Craig *v.* Brown, 5 Blackf. 44.

[5] Onslow *v.* Horne, 2 W. Black. R. 750; 3 Wills. 177. The words complained of were: "As to instructing our members to obtain redress, I am totally against that plan; for as to instructing Mr. Onslow [the plaintiff], we might as well instruct the winds, and should he [the plaintiff] ever promise his assistance, I should not expect him to give it us." One of the reasons for holding the words not actionable was, they did not charge the plaintiff with any breach of his duty, his oath, or any crime or misdemeanor whereby he had suffered any temporal loss, in future office, or in any way whatever.

[6] Hogg *v.* Dorrah, 2 Port. 212.

[7] Thomas *v.* Croswell, 7 Johns. 264; and see Wilson *v.* Noonan, 23 Wis. 105.

[8] Root *v.* King, 7 Cow. 613; 4 Wend. 113.

[9] Riggs *v.* Dennison, 3 Johns. Cas. 198.

ed to the department for the sum paid by W. by some $32,000." "In the settlement of the funds of W., amounting to many hundreds of thousands of dollars, the amount paid by them was $157,224; only $125,224 was accounted for, of which $62,612 was credited to the government, leaving the same amount ($62,612) divided between the collector, the naval officer, and the surveyor; it is not known what has been done with the balance, amounting to the large sum of $32,000, and it is understood that this settlement was made through the interventions of S. and his partner, the late deputy collector; it is discreditable to the government to have it generally known that the sum of $157,224 was paid by W. in a settlement with the government, and that $32,000 of that sum was not accounted for." No words alleging a failure to pay on demand were charged. The innuendoes averred the imputation of embezzlement and of receiving a bribe. *Held*, that the words were not actionable.[1]

§ 197. We have already directed attention to the distinction between patently and latently wrongful acts, and to the rule of law that the necessary and natural and proximate consequences of an act are those alone for which the actor is responsible (§ 61); and we have pointed out the difference between language being actionable *per se* and actionable only by reason of special damage (§ 146). So far, this chapter has been solely devoted to language actionable *per se;* we have now to consider what language *concerning a person* is actionable, because, and only because, its publication has occasioned *special damage.* "Undoubtedly all words are actionable if a special damage follows."[2] "Any words are actionable by which the

[1] Goodrich *v.* Hooper, 97 Mass. 1.

[2] Heath, J., Moore *v.* Meagher, 1 Taunt. 39; and see, among other cases, Wilby *v.* Elston, 13 Jur. 706; 8 C. B. 142; 7 Dowl. & L. 143; Barnes *v.* Trundy, 31 Maine (1 Red.), 321; McCuen *v.* Ludlam, 2 Harrison, 12; Bentley *v.* Reynolds, 1 McMullan, 16. Acts (words) may be harmless in themselves, so long as they injure no one,

party has a special damage."[1] "To make words actionable, they must be such that special damage may be the fair and natural result of them."[2] "There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages, and the clear and wise one has been fixed by law."[3] The limitation is that special damage must ensue. But what is meant by special damage? Special damage is a term ambiguously employed; properly, it connotes the natural and proximate but not necessary consequences of a wrongful act;[4] but it is frequently used to indicate any or all loss which, not being a necessary consequence is the subject of other proof than the mere commission of the act complained of, and without regard to whether such loss is or is not a natural or natural and proximate consequence of such act. The term is employed in the latter sense when it is said that language which occasions *special damage* is not actionable unless it be defamatory,[5]

but the consequences of acts (words) often give character to the acts (words) themselves. (Van Pelt *v.* McGraw, 4 N. Y. 113.)

[1] Comyn's Dig. Act. for Defam. D, 30.

[2] Taunton, J., Kelly *v.* Partington, 3 Nev. & M. 116; 5 B. & Adol. 645.

[3] Strong, J., Terwilliger *v.* Wands, 17 N. Y. 61.

[4] Such damages as are the *natural*, although not the necessary result of the injury, are termed special damages. (Vanderslice *v.* Newton, 4 N. Y. 132.) The special damage must be the immediate, not the remote consequence of the publication. (Beach *v.* Ranney, 2 Hill, 309; Sewall *v.* Catlin, 3 Wend. 291.) "The damage must be the natural and proximate consequence of the wrongful act complained of." (2 Smith's Lead. Cas. 534, 6th ed.) "Special damage must be the natural, general, and I may say the universal result upon all mankind placed in the same circumstances." (Martin B. Allsop *v.* Allsop, 5 H. & N. 534.) For "To make the act of a moral agent the juridical cause (which means, the proximate cause) of an event, the act in question must be of such a character, that, if not interrupted by causes independent of the actor's will, or by the intervention of other persons, it will, under ordinary circumstances, produce the event in question." (Whart. Neg., sec. 302.) "I have always understood that the special damage must be the natural result of the thing done." (Patteson J., Kelly *v.* Partington, 5 B. & Adol. 546; and see Haddan *v.* Lott, 15 C. B. 411; 24 Law Jour. Rep. N. S. C. P. 49.) The special damage must be in consequence of the defendant's act. (Hastings *v.* Palmer, 20 Wend. 225.)

[5] "The special damage will not help you if the words are not defamatory." (Blackburn, J., Young *v.* Macrae, 3 Best & S. 264; 7 Law Times, N. S. 354. To the like effect, Sheahan *v.* Ahearne, 9 Ir. R. C. L. 412; Miller *v.* David, L. R. 9 C. P. 126; 22 Weekly Rep. 332.) That words, to be actionable, need not be *defamatory* of the individual, is shown from the fact that words concerning things may be actionable.

which is equivalent to saying, that language which, as a natural and proximate consequence, occasions loss, is not actionable unless it is injurious (defamatory). If the language is not injurious (defamatory) in its nature, it cannot, as a *natural* consequence, occasion loss, and it may well be that none other than language defamatory in its nature (disparaging) can as a natural and proximate consequence occasion loss.[1] It may be correct to say that "to make the words wrongful they must in their nature be defamatory,"[2] provided the rule thus expressed be understood as being subordinate to and implied in the more comprehensive rule, that to render actionable that language which is not actionable *per se*, the language must occasion special damage, in the proper sense of that term.[3]

[1] Complaint alleged that in consequence of a letter written by defendant to the employers of plaintiff they had discharged him. The letter was in substance: that "Mr. Dickson (the plaintiff) has been for many months past doing unmercantile things, such as telling our customers to be sure to get an inside; that we give it, and they are fools if they don't secure it, and such like. He, further, takes samples of our cloth and shrinks them, saying our goods shrink and his don't; also fishes up some old samples and says, in the same way, that our goods are greasy, &c., &c. This, by carrying about him such samples, is hardly businesslike, and the trade look at it exactly as we do, and tell us of it on every hand; there can be no gainsaying the truth of this, and I might quote much more, but Mr. D. needs no prompting; he knows of these and other things, such as comments on our men, &c." "I have had some of the basis of my complaints in person from the trade, and if any exigency existed requiring it, there are others who could be used. All that I could complain of there was your Mr. D. again treating with men in our employ, after being here soliciting help, &c.—a little unusual proceeding in this section of the country." On demurrer to complaint, held that the language was not defamatory, and that the dismissal of plaintiff by his employers was not a natural result of the publication. (Dickson *v.* Phillips, 51 Superior Ct. [19 J. & S.] 162.) Where the words of a clerk [plaintiff] were: "He has caused the ruin of my clerk; he has been the ruination of my clerk; I do not want him to have anything to do with my business," which were followed by plaintiff's dismissal by his then employers, held to show a cause of action. (Wilson *v.* Cottman, 65 Md. 190.) See note to § 199, *post*, and note 2, p. 242, *ante*.

[2] Patteson, J., Kelly *v.* Partington, 5 B. & Adol. 645.

[3] "I cannot agree that words laudatory of a person's conduct would be the subject of an action if they were followed by *special damage*. They must be defamatory or injurious in their nature." (Littledale, J., Kelly *v.* Partington, 3 Nev. & M. 117; 5 B. & Adol. 645.) "The words must be defamatory in their nature; and must in fact disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result." (Strong, J., Terwilliger *v.* Wands, 17 N. Y. 61; and see Hallock *v.* Miller, 2 Barb.

The real question must always be, was the damage complained of a natural and proximate consequence of the publication?[1] For "it is a rule equally consistent with good sense, good logic, and good law, that a person who would recover damages for an injury occasioned by the conduct of another, must show as an essential part of his case, the relation of cause and effect between the conduct complained of and the injury sustained."[2]

§ 198. What is special damage? Special damage consists[3] in, among other things, the loss of marriage, loss of *consortium* of husband and wife,[4] loss of emoluments, profits, customers, employment, or gratuitous hospitality,[5] or by being subjected to any other inconvenience or annoy-

633; Bell *v.* Sun Print. & Pub. Co. 42 Superior Ct. [10 J. & S.] 567; 3 Abb. N. C. 157; and §§ 72, 176, *ante*.)

[1] Denman, Ch. J., Knight *v.* Gibbs, 1 Adol. & El. 43.

[2] Olmstead *v.* Brown, 12 Barb. 662. Defendant published in a newspaper defamatory matter of plaintiff. One of her acquaintances cut out the words, pasted the slip on a postal card and sent it to plaintiff. Held that if the publication on the postal card was a natural consequence of defendant's publication, she was responsible for it, and it was for the jury to say whether the publication on the postal card was the natural consequence of defendant's publication. (Zier *v.* Hoflin, 33 Minn. 66.) But in an action for slander, evidence that a particular person, who was not present when the slander was uttered, has ceased to show hospitality to plaintiff in consequence of a subsequent repetition by some one in such person's hearing of the slander complained of, is no evidence of special damage. (Clarke *v.* Morgan, 38 L. T. N. S. 354; § 114, *ante*, and § 202, *post*.)

[3] "As to what constitutes special damage Starkie mentions the loss of marriage, loss of hospitable gratuitous entertainment, preventing a servant or bailiff from getting a place, the loss of customers by a tradesman, and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient." (Terwilliger *v.* Wands, 17 N. Y. 60; citing Starkie on Slander, 195, 202; Cooke on Defam. 22, 24; Albrecht *v.* Patterson, 12 Vict. Law Rep. 597.) Plaintiff being refused employment (Sterry *v.* Foreman, 2 Car. & P. 592), or insurance upon a ship of which he was master (Shipman *v.* Burrows, 1 Hall, 399), is special damage.

[4] Lynch *v.* Knight, 5 Law Times, N. S. 291; 9 House L. 577; Parkins *v.* Scott, 6 Law Times, N. S. 394; 1 House L. 153; Roberts *v.* Roberts, 33 Law Jour. Q. B. N. S. 249; and see Passman *v.* Fletcher, Clayton, 73.

[5] Moore *v.* Meagher, 1 Taunt. 39; Williams *v.* Hill, 19 Wend. 305. Where a father, in consequence of defamatory words spoken of his minor daughter, although he entirely disbelieves them, refuses to furnish her with proper articles of clothing, or means of education, this is not such special damage as will sustain the action, as such treatment by a parent of his child *is not the natural* result of a falsehood reported of her. (Anon. 60 N. Y. 262.)

ance occasioning or involving an actual or constructive pecuniary loss.[1] The special damage must be the loss of some material temporal advantage.[2] Loss of *consortium vicinorum* is not sufficient.[3] Where the declaration alleged that defendant had spoken of the female plaintiff that she had connection with a man two years ago, whereby she was injured in her reputation, became alienated from and deprived of the cohabitation of her husband, lost and was deprived of the companionship, and ceased to receive the hospitality of divers friends, of whom her husband and three other persons were named, held, upon demurrer, that the declaration was good, the special damage

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[1] "All the cases proceed upon the assumption that the plaintiff has sustained some pecuniary loss in consequence of the slander. It is not sufficient that she has fallen into disgrace, contempt and infamy, and lost her credit, reputation and peace of mind, or the society or good opinion of her neighbors, unless she has been injured in her estate or property." (Woodbury *v.* Thompson, 3 New Hamp. 194; and see *ante*, notes 1, p. 46, and 1, p. 50; Kelly *v.* Partington, 3 Nev. & M. 116; Keenholts *v.* Becker, 3 Denio, 346; Foulger *v.* Newcomb, Law Rep. 2 Ex. 330.) And, because in England, the fees of barristers and physicians are honorary, it has been doubted if barristers or physicians can sustain special damage in their professions. (Brown *v.* Kennedy, 32 Law Jour. Chan. 342.) The doubt, however, is ill-founded, as the loss of a gratuity is special damage. (Hartley *v.* Herring, 8 T. R. 130; and note 3, p. 263, and note 4, p. 270, *post*.) "One essential element of a good cause of action for defamation is damage;" but in Terwilliger *v.* Wands (17 N.Y. 61), and Wilson *v.* Goit (*Id.* 442), the whole tenor of the opinions implies that loss of reputation is the gist of the action, and in the first-named case it is said, "It is injuries affecting the reputation only, which are the subject of the action." "The special damage must flow from impaired reputation." This, however, may mean only that the language must be defamatory. (See Samuels *v.* Evening Mail Asso. 6 Hun, 5; *ante*, note p. 46.)

[2] Claim that plaintiff was a candidate for membership of the R. club, but upon a ballot was not elected; a meeting of the members was called to consider an alteration of the rules regarding election of members; that defendant falsely and maliciously spoke of plaintiff, "The conduct of the plaintiff was so bad at a club in M. that a round robin was signed urging the committee to expel him," whereby defendant induced a majority of the club members to retain the regulations under which plaintiff had been rejected, and thereby prevented plaintiff from again seeking to be elected. Held, upon demurrer, that the claim disclosed no cause of action; the words were not actionable in themselves nor supported by special damage. The damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of defendant's words. (Chamberlain *v.* Boyd, 11 Q. B. D. 407.) Charging a candidate for office with being a freemason, whereby his canvass was injured, held actionable. (Lareau *v.* La Minerve, 27 L. C. J. 337, Quebec.)

[3] Roberts *v.* Roberts, 33 Law Jour. Q. B. 250; Beach *v.* Ranney, 2 Hill, 309.

being sufficient to sustain the action.[1] But where a declaration, after stating the words, which were not actionable *per se*, alleged "whereby plaintiff has been damaged and injured in her name and fame," on demurrer held not to disclose any special damage, and demurrer allowed.[2] Where words were spoken imputing unchastity to a woman, by reason whereof she was excluded from a private society and congregation of a sect of Protestant dissenters, of which she had theretofore been a member, and was prevented from obtaining a certificate, without which she could not become a member of any other society of the same nature, held that such a result was not "special damage," and did not render the words actionable;[3] but an action was held maintainable where the plaintiff, an unmarried woman, in consequence of a charge of incontinence, was refused civil treatment at a hotel or tavern.[4] A charge of incontinence against an unmarried woman, whereby she loses her marriage, is actionable,[5] as to say of the plaintiff, "Anne Reston hath had a child, and if she has not a child, she has made away with it;"[6] or, "You ought not

[1] Davies *v.* Solomon, Law. Rep. 7 Q. B. 112.

[2] Pollard *v.* Lyon, 1 Otto (91 U. S.), 225. An allegation that the words "injured plaintiff in her good name and caused her relatives and friends to slight and shun her," held not to disclose special damage. (Bassell *v.* Elmore, 48 N. Y. 563; 65 Barb. 627.) And the allegation was that, by reason of the words, "plaintiff had been slighted, neglected and misused by the neighbors and her former associates, and turned out of doors;" but on the trial the only proof of special damage was that plaintiff had been requested to leave the house of one D., where she went to make a call: she was nonsuited, and the court above sustained the nonsuit. (Pettibone *v.* Simpson, 66 Barb. 492.) A declaration which concluded, whereby plaintiff lost the friendship and hospitality of certain persons, naming them, and of his neighbors, divers of whom refused to transact business with him, and from whose friendship, hospitality and business dealings plaintiff had theretofore derived profit and advantage, held not to state special damage. (Ashford *v.* Choate, 20 Up. Can. C. P. Rep. 471.)

[3] Roberts *v.* Roberts, 33 Law. Jour. Q. B. 250.

[4] Olmstead *v.* Miller, 1 Wend. 510.

[5] Davis *v.* Gardiner, 4 Co. 16. Saying orally of plaintiff: "She was with child and miscarried," by which she lost suitors, not actionable. (Barnes *v.* Prudlin, 1 Sid. 396.) But saying of a servant, she had a miscarriage, and lost her place in consequence, held actionable. (Connors *v.* Justice, 13 Ir. C. L. R. 451.)

[6] Reston *v.* Pomfreict, Cro. Eliz. 639.

to marry her [the plaintiff], for before God she is my wife, and therefore, if you do you will live in adultery, and your children will be bastards."[1] Loss of a wife is the same to a man as loss of a husband is to a woman, and therefore, where the defendant called the plaintiff a whoremaster, whereby he lost his marriage, it was held he could maintain his action;[2] and so saying of one who was a widower, that he had kept his wife basely, and starved her or denied her necessaries, whereby he lost his marriage was held actionable;[3] and calling plaintiff bastard, whereby he lost his marriage, was held actionable.[4] As to loss of customers, where it was said of an innkeeper, I [defendant] saw Cook lie with Collins' [plaintiff's] wife, whereby plaintiff lost his customers, it was held that an action could be maintained;[5] and so where it was said of an innkeeper, that a person had died in his house of the plague, whereby his [plaintiff's] guests left his house, it was held he might maintain his action.[6] Words imputing in-

[1] Sheperd *v.* Wakeman, 1 Sid. 79. Saying of a woman, she was a man, not a woman, with special damage, held actionable. (Pye *v.* Wallis, cited Curt. 55.) See Hermaphrodite.

[2] Matthew *v.* Crass, Cro. Jac. 323; 2 Bulst. 86; and see Sell *v.* Facy, 2 Bulst. 276; Southold *v.* Daunston, Cro. Car. 269; *contra*, see Witcher's Case, Keb. 119. In Taylor *v.* Tally (Palmer, 385), defendant said of plaintiff that he, plaintiff, had ravished the wife of H.; and plaintiff alleging that thereby he lost his marriage, the words were held actionable.

[3] Anon. Mar. 2; Wicks *v.* Shepherd, Cro. Car. 155.

[4] Nelson *v.* Staff, Cro. Jac. 422. Saying of the plaintiff, he hath been in bed with Dorchester's wife, whereby he lost his marriage, held actionable. (Southold *v.* Daunston, Cro. Car. 269; *ante*, § 174.)

[5] Collins *v.* Matthews, 3 Keb. 242; and see Riding *v.* Smith, Law Rep. 1 Ex. Div. 91; Harnett *v.* Wilson, 1 Vict. Law Times, 45.

[6] Comyn's Dig. Act. for Def. D, 29; as to loss of customers, see Evans *v.* Harries, 1 Hurl. & Nor. 251; Vin. Abr. Act. for Words, U, *a*, 13; Brown *v.* Gibbons, 2 Ld. Raym. 831; Coleman *v.* Harcourt, 1 Lev. 140; Trenton Ins. Co. *v.* Perrine, 3 Zabr. 402. Action by a butcher for saying a cow, the carcass of which he had to sell, died by calving, by which he lost his customers, judgment was given for the plaintiff, but reversed on error, the alleged loss of customers being too general; but held that had it been laid, the plaintiff *exposed the meat for sale*, and by reason of the words he lost the sale, the action could have been maintained. (Rice *v.* Pidgeon, Comb. 161, and Tassan *v.* Rogers, 2 Salk. 693.) "A distinction has been made between *particular* damage and *general* damage; thus, in an action for slandering a man in his trade, when the declaration alleges that he thereby lost his trade, he may show a general damage to his trade, though he cannot give evidence of particular

continence to a dissenting minister, whereby the persons frequenting his chapel refused to permit him to preach, and discontinued giving him certain reward as they usually had, and but for the publication complained of, would have done, were held actionable.[1] Where the declaration alleged that plaintiff being the proprietor of certain rooms adapted for a dancing academy, defendant falsely and maliciously published of the building and rooms, and of plaintiff as proprietor thereof, that "the magistrates having refused to renew a music and dancing license to the proprietor, all such entertainments there carried on are illegal and the proprietor renders himself thereby indictable for keeping a disorderly house, and every person found on the premises will be apprehended and dealt with according to law," by means of which publication plaintiff was prevented from letting said rooms; held on demurrer that the declaration disclosed a cause of action.[2]

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instances." (Cresswell, J., Rose *v.* Groves, 5 M. & G. 618; Hartley *v.* Herring, 8 T. R. 130.) The words, You are an infernal rogue and swindler, spoken of the keeper of a restaurant, were held not actionable; they did not affect plaintiff in his occupation. But the plaintiff having alleged that, by reason of the words, people who used to frequent his restaurant, ceased to deal with him. it was held the special damage made the words actionable, and that the special damage was sufficiently alleged; that the cases of frequenters of theatres, members of congregations, and travelers using an inn, were exceptions to the rule requiring the names of the customers lost to be set forth. (Brady *v.* Goulden, Melbourne Argus Rep. Sept. 6th, 1867; Kerford & Box's Digest of Victoria Cases, 709.) A general allegation of loss of trade is sufficient in ordinary cases, without setting out names of customers, and may be supported by evidence of such general loss. (Weiss *v.* Whittemore, 28 Mich. 366; § 345, *post*.) A general allegation that by reason of defendant's acts, plaintiff had been compelled to pay a large sum of money, without showing how, held insufficient. (Cook *v.* Cook, 100 Mass. 194.) To prove the loss of a customer, the customer must be called to prove *why* he ceased to deal with the plaintiff, and if the witness says he ceased to deal with plaintiff in consequence of something he heard from one not the defendant, it is not special damage. (Barnett *v.* Allen, 1 Fos. & F. 125; and see Dixon *v.* Smith, 5 Hurl. & N. 450; Hirst *v.* Goodwin, 3 Fos. & F. 257; Sewall *v.* Catlin, 3 Wend. 292.)

[1] Hartley *v.* Herring, 8 T. R. 130.

[2] Bignell *v.* Buzzard, 3 Hurl & Nor. 217. In Dibdin *v.* Swan, 1 Esp. Cas. 28, the plaintiff was the proprietor of a place of amusement called Sans Souci, where he sang certain songs supposed to be composed by himself; he sued the defendant, the proprietor of a newspaper called the World, for publishing in that paper that such songs were not composed by the plaintiff; that on the first night when plaintiff sang there had been a very thin audience, and that composed

§ 199. Where the person to whom the publication is made is, by reason of the charge, induced to act upon it to the prejudice of the person whom it may concern, it is in a measure immaterial whether the person to whom the publication was made believed or disbelieved in the truth of the charge; thus, where a charge was made to A., against a female [the plaintiff] in her, A.'s, employ, in consequence of which A. dismissed the plaintiff from her employ, and, on the trial, A. testified that such dismissal was not because she believed the charge to be true, but because she was afraid she should offend the defendant, her landlord, by retaining plaintiff in her employ; held, that the special damage, the dismissal, being a natural consequence of the charge, the action was maintainable.[1] But, in another case, the disbelief of the person to whom the publication was made was held to be material. Thus, where a father had promised his daughter [the plaintiff] clothing and instruction in music, and, in consequence of the words published by defendant concerning plaintiff, the father, although he did not believe said words to be true,

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of persons admitted by orders (for free admission), and that the applause was only from the persons so admitted. The report does not state the result of the case, but merely the charge of Lord Kenyon, that the editor of a newspaper may fairly and candidly comment on any place or species of public entertainment, but it must be done fairly and without malice or view to injure the proprietor. That if so done, however severe the censure, the justice of it screens the editor from legal animadversion; but if the comment be unjust, malevolent, or exceeding the bounds of fair opinion, it is actionable. As to comments on theatrical performances, see Fry *v.* Bennett, 5 Sandf. 54; 3 Bosw. 200; 28 N. Y. 324; *post*, § 253, *et seq.* In England the right to hiss an actor seems to be conceded, but in New York the opinion seems to be that to hiss at a theatrical performance is a disturbance of a lawful meeting and a misdemeanor under § 448 of the Penal Code. (Gregory *v.* Duke of Brunswick, 6 M. & G. 953; see The Law of Theatres & Music Halls, by W. N. M. Geary).

[1] Knight *v.* Gibbs, 3 Nev. & M. 467; 1 Adol. & El. 43. I do not know that the belief of the party is at all material. I may not believe a charge, and yet I may not have the courage to keep a person who is suspected by others. I think it better that we should lay it down generally, that if the words are slanderous, and are acted upon to the prejudice of the party slandered, an action may be maintained. (*Id.*) To the like effect see Gillett *v.* Bullivant, 7 Law Times, 490. *Contra* is a dictum, Wilson *v.* Goit, 17 N. Y. 445. "An action of slander . . would plainly be perverted if allowed where the slanderous words were not credited by any individual." See note 5, p. 261, *ante*.

yet he withheld the performance of his promise, such withholding was held not to be special damage. It was not a *natural result* of the words that a father who did not believe them to be true, should therefore withhold a contemplated benefit to his daughter.[1] These decisions are quite consistent. In the first, the act induced by the words published was a *natural result* of the publication; in the second case, the act induced was not a natural result. And this shows that it is not the belief or disbelief in the truth of the charge published which is the controlling circumstance, but the controlling circumstance is whether or not the injury which followed the charge was or was not a natural consequence thereof (§§ 198 and 202).

§ 200. Mere apprehensions of loss is not such special damage as will maintain an action;[2] as where defendant said of plaintiff that he had two bastards, and the alleged special damage was that, by reason of the words, a contention arose between plaintiff and his wife, and he was in danger to be divorced.[3] And where the defendant said of plaintiff, she is with child by T. S., and the alleged special damage was that in consequence of the words the father of plaintiff *threatened* to turn her out of his house, this was held not to amount to such special damage as

[1] Anon. 60 N. Y. 262, Grover, J.: "I do not think special damage can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge made by the defendant, that constitutes the damage which the law redresses."

[2] Where plaintiff alleged that he was and had been engaged in the compilation of a certain directory which he published biennially; and that by reason of the false statement of defendant that he, plaintiff, had gone out of business, he, plaintiff, was prevented from compiling and publishing a directory as he had intended; but did not allege that by any acts of defendant, he, plaintiff, had been deprived of the benefit of any contract he had made, or of any property in existence, or that the defendant published his directory as a directory prepared and published by plaintiff, held that plaintiff showed no cause of action against defendant, as it was entirely problematical whether plaintiff would actually have published a directory if defendant had not made the representations as alleged. (Dudley *v.* Briggs, 141 Mass. 582; 33 Alb. L. J. 486.)

[3] Barmund's Case, Cro. Jac. 473; Salter *v.* Browne, Cro. Car. 436.

would support an action.[1] Where the plaintiff alleged that she was a single woman and chaste, and that her mother meant to give her £150 and her brother £100, and that by reason of the defendant's charging her with incontinence, they did not give her these sums, it was doubted if the action was maintainable, and no judgment was rendered.[2] Again, where the plaintiff alleged that by reason of the publication he had incurred the ill-will of his mother-in-law, who had previously promised him £100, held that no cause of action was shown.[3] Where the plaintiff alleged that her brother had promised to supply her with the means to emigrate from Ireland, but in consequence of the defendant's imputation her brother had retracted his promise until the truth of the charge was established or refuted, this was held to constitute special damage, and that it was not necessary to allege that there was any consideration for the brother's promise.[4] Where the injury to the plaintiff is the result in part only of the defendant's act, subject to the qualifications hereafter to be mentioned, it will not give a right of action against the defendant; thus, where the plaintiff was discharged from his employment partly on account of the publication by the defendant and partly from other causes, it was held that the plaintiff could not recover.[5] And where the plaintiff alleged that in consequence of the words he [the plaintiff] refused to marry his betrothed, and so he lost his marriage, it was held the loss of marriage did not under such circumstances constitute special damage.[6] Where the plaintiff alleged that, by reason of the

[1] Barnes *v.* Bruddell, 2 Keb. 451; S. C. 1 Lev. 261.

[2] Bracebridge *v.* Watson, Lilly Ent. 61. See the case of an alleged novice in a religious community. (Dwyer *v.* Meehan, 18 L. R. Ir. 138.)

[3] Harris *v.* Porter, Curt. 1; see Anon. 60 N. Y. 262.

[4] Corcoran *v.* Corcoran, 7 Ir. L. R. N. S. 272. A voluntary benefit withdrawn is special damage. (Campbell *v.* White, 5 Ir. Com. Law Rep. 312; 1 Ir. Jur. N. S. 213.)

[5] Vicars *v.* Wilcocks, 8 East, 1; 2 Stark. Ev. 637. See note 5, p. 261, *ante*.

[6] Carter *v.* Smith, Vin. Abr. Act. for Words, D, *a*, 10.

language published by the defendant, all honest persons refused to marry their daughters to him [the plaintiff], held that the plaintiff did not disclose a cause of action.[1] As the law gives no direct remedy for outraged feelings or sentiments (§ 56), a sickness induced by mental distress in consequence of the language published, followed by inability to transact business and expense for medical attendance, does not constitute special damage, and for words not actionable *per se* which occasion such results, no action can be maintained.[2] But where the language is actionable *per se*, and the case is one for exemplary damages, the jury may be instructed to consider the injury to plaintiff's feelings.[3] If, after a recovery has been had in an action for slander or libel, special damage occurs, no action can be maintained therefor; the first recovery is a bar to any subsequent action.[4]

§ 201. It has been very generally reputed and accepted for law, that the illegal act of a third party cannot consti-

[1] Norman *v.* Simons, Vin. Abr. Act. for Words, D, *a*, 12.

[2] Terwilliger *v.* Wands, 17 N. Y. 54; Wilson *v.* Goit, 17 N. Y. 442; Allsop *v.* Allsop, 5 Hurl. & Nor. 534; Bedell *v.* Powell, 13 Barb. 183; Samuels *v.* Ev'g Mail Asso. 6 Hun, 5; Prime *v.* Eastwood, 45 Iowa, 640. These decisions overrule Bradt *v.* Towsley, 13 Wend. 253; Fuller *v.* Fenner, 16 Barb. 333; Olmstead *v.* Brown, 12 Barb. 657; Underhill *v.* Welton. 32 Vt. (3 Shaw) 40, and do not accord with what is said in Williams *v.* McManus, 38 La. An. 161; Chisley *v.* Tompson, 137 Mass. 136. In McQueen *v.* Fulgham, 27 Texas, 473, it was held that proof of sickness contemporaneous with the publication of the alleged libel was not proof that the alleged libel was the cause of such sickness. See § 290, *post*. In New York, it has been held that plaintiff being shunned by her neighbors, and turned out of the moral reform society, did not constitute special damage. (Beach *v.* Ranney, 2 Hill, 309; and see *ante*, note 3, p. 265. Loss of a wife's services from illness occasioned by the publication of language not actionable *per se*, is not special damage so as to give a right of action to the husband. (Wilson *v.* Goit, 17 N. Y. 442; Allsop *v.* Allsop, 5 H. & N. 534; 29 L. J. Ex. 315; and see Guy *v.* Gregory, 9 Car. & P. 584; Beach *v.* Ranney, 2 Hill, 309; Lehman *v.* Brooklyn City R. R. Co. 47 Hun, 365; Renner *v.* Canfield, 34 Alb. L. J. 3.) In an action by husband and wife, for words of the wife actionable *per se*, the plaintiff cannot recover as special damage loss occasioned by one refusing to employ his wife as a servant. That is damage for which the husband alone must sue. (Dengate *v.* Gardiner, 4 M. & W. 5.)

[3] Brooks *v.* Harrison, 91 N. Y. 83. Where a cause of action exists, injury to the feelings may be aggravation. See § 391, *post*.

[4] Bull. N. P. 7, citing Fittler *v.* Veal, Cas. Pr. K. B. 542; Cooke Defam. 24.

words, that one illegal
al and proximate conse-
l) act. This idea appears
he expression that spe-
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in which the defendant
cut his master's cordage,
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im, it was held the plaint-
discharge did not consti-
is not a natural and *legal*
hat the defendant was no
e than if in consequence
s had assaulted the plaint-
laintiff could recover, for
erform his legal contract,
same cause—once in the
in an action against the
his contract.[1] It was suf-

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[1] ons; and the law supposes that, in
actions, the plaintiff would re-
e a full indemnity." The author-
of both these cases has been very
ch questioned. See Collins *v.*
e, 4 Hurl. & N. 225; 6 *Id.* 131;
ker *v.* Goe, 3 *Id.* 395; 4 *Id.* 351;
en *v.* Button, 2 Cr. M. & R. 707;
particularly Lynch *v.* Knight, 9
se of Lords Cas. 577, where Lord
sleydale says: "I strongly incline
gree that to make the words ac-
able by reason of special damages,
consequences must be such as
g human nature with its infirmi-
and having regard to the rela-
ship of the parties concerned,
t fairly and reasonably have been
cipated, and would follow from
speaking of the words, not what
d reasonably follow or what we
t think would follow."

ficient to sustain this decision that the discharge was not a *natural* consequence of the publication; the residue of the decision is *obiter*, and is not sustainable either on principle or precedent. Subsequently, in an action for words whereby one who was under a contract to marry the plaintiff, broke his contract and refused to marry her, it was urged against the maintenance of the action that the plaintiff had her remedy on the contract to marry her, that the breach of the contract was an *illegal* act of the contracting party, and that the breach of said contract was not special damage, because not a *legal* consequence of the publication, but the action was sustained.[1] These decisions, although apparently conflicting, are not so in reality; for obviously an illegal act, equally with a legal act, *may* be the natural consequence of a publication, and where, as in the case of a promise to marry, the breach of it, although illegal, is nevertheless a natural consequence of the publication, in that case the illegal act constitutes special damage; but where the breach of a contract is not a natural, or, if a natural, is not a proximate consequence of the publication, in such a case, the breach of contract does not constitute special damage, not because such breach is an illegal act, but because it is not a natural and proximate consequence of the publication.[2] Where the defendant published language concerning one, an actress, in the em-

[1] Moody *v.* Baker, 5 Cow. 351.

[2] There are many cases where a recovery has been had for illegal acts of third persons induced by the defendant's act, as for preventing workmen from continuing their work. enticing away wives, servants, apprentices, or tenants, &c. See in note, p. 3, *ante;* and Green *v.* Button, 2 Cr. M. & R. 707; Lumley *v.* Gye, 2 Ell. & Bl. 216. Where there was evidence that the words were spoken with the intent to make a third person break his contract with plaintiff; held that the breaking of the contract was special damage in an action for publishing those words. (Carrol *v.* Falkiner, Melbourne Argus Rep. Sept. 3, 1867.) Where the special damage alleged was that A., of whom plaintiff had purchased barley, had, in consequence of something said by defendant, refused to deliver said barley. On the trial, A. was called as a witness, and counsel permitted to ask him whether it was not in consequence of what others told him that he refused to deliver. (King *v.* Watts, 8 C. & P. 614; see § 206, *post*. And see Society Francais des Asphaltes *v.* Farrell, 1 Cababé & E. 563; Brentman *v.* Note, 3 N. Y. Suppl. 420.)

ploy of another, the proprietor of a theater, in consequence of which such employee refused to fulfill her engagement with her employer [the plaintiff], and whereby the plaintiff, as he alleged, lost profits in his business, it was held that the action could not be maintained.[1] That the damages were too remote is usually assigned, and is one of the expressed grounds for the decision; another and a sufficient ground would be, that her refusal to fulfill her engagement was not a natural result of the publication.

§ 202. Ordinarily the repetition (§§ 112, 114, 115) of defamatory language [slander] by another than the first publisher is not a natural consequence of the first publication, and therefore, except under circumstances to be presently referred to, the loss resulting from the repetition of defamatory language does not constitute special damage, and is not attributable to the first publisher.[2] Thus, where it was alleged that defendant said of plaintiff, "He is a rogue and a swindler; I know enough about him to hang him," and it was alleged as special damage that one B., who was about to sell goods to plaintiff on credit, had, by reason of *defendant's* representation, refused to trust plaintiff; on the trial the proof was that defendant spoke the words to one C., who repeated them to B., and that it was

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[1] Ashley *v.* Harrison, 1 Peake's Cas. 194. In an action for fraudulently selling plaintiff diseased sheep, held it was not special damage that in consequence of a report that plaintiff had purchased defendant's diseased sheep, one A. refused to complete a contract he had with plaintiff for a supply of meat, or that plaintiff's customers had left him. (Crain *v.* Petrie, 6 Hill, 523.) See observations in Kendall *v.* Stone, 5 N.Y. 20, and note to § 206, *post*.

[2] Stevens *v.* Hartwell, 11 Metc. 542; Olmsted *v.* Brown, 12 Barb. 657; Keenholts *v.* Becker, 3 Denio, 346; Terwilliger *v.* Wands, 17 N. Y. 58; Dixon *v.* Smith, 5 Hurl. & N. 450; Barnett *v.* Allen, 1 Fost. & F. 125. A complaint for libel, for words contained in a letter and not actionable in themselves, alleged that the letter was read by third persons to whom the receiver showed it, and alleged special damage from this and not from the reading by the receiver. Held the complaint was bad for not alleging that the writer authorized the receiver to show it. (Gough *v.* Goldsmith, 44 Wis. 262; and see note 2. page 94. and note 4. page 261, *ante*.) For a republication (§ 112, 114), not only the original publisher but the republisher is liable.

in consequence of that repetition, and nothing else, that B. refused to trust plaintiff, it was held the defendant was not liable for the consequences of the repetition, and that the plaintiff could not recover.[1] In Parkins *v.* Scott, the defendant charged Mrs. Parkins with adultery; she communicated this fact to her husband, and he, in consequence, refused to cohabit with her.[2] It was held that no action could be maintained, for, although loss of *consortium* of husband or wife may constitute special damage (§ 198), yet, under the circumstances, the defendant was not liable. In some instances, the circumstances of the case may be such as render the repetition of the language by another than the first publisher, a link in the chain of natural consequences of the first publication, and the loss by such repetition to the person whom the language concerns a natural and proximate consequence of the first publication, and therefore special damage for which the first publisher is responsible. Where a police magistrate, after disposing of a charge before him, said to a police officer [the plaintiff] who had been examined as a witness in the matter, that he was not to be believed, and this being heard by another officer present, was by him reported to the plaintiff's employer's, the police commissioners, and they, in

[1] Ward *v.* Weeks, 7 Bing. 211. The decision seems to have been put on the ground of a variance, the allegation being that the injury was in consequence of a publication by the defendant, and the proof being that the injury was in consequence of a publication by another. (See Tunnicliffe *v.* Moss, 3 C. & K. 83; Dicken *v.* Shepherd, 22 Md. 399.) Where words were spoken to a servant of the plaintiff imputing incontinence to the plaintiff, and the plaintiff alleged for special damages that in consequence of the words, J. S., who was in communication of marriage with her, refused to marry her, the plaintiff failed to sustain her action, because the words were not spoken to J. S. (Holwood *v.* Hopkins, Cro. Eliz. 787.) In Moody *v.* Baker, 5 Cow. 351, it was held that the declarations of the man that he was not influenced in his refusal to marry by the words published were not admissible.

[2] 1 Hurl. & Colt. 154; S. C. Parkins *v.* Scott, 6 Law Times, N. S. 394. D. & C. signed a libelous communication concerning H., and intrusted it to L. for publication. L. took it to a newspaper correspondent who rewrote it, cutting it down, and without authority signed the names of D. & C. to it. It was thus published. D. & C. saw it and did not disavow it. D. admitted he had signed it. Held D. was liable and C. was not. (Dawson *v.* Holt, 11 Lea. 583.)

consequence, dismissed the plaintiff from their employment, it was held, in an action against the magistrate, that such dismissal was special damage.[1] Where the plaintiff was governess in the family of A., and the defendant published language to the plaintiff's father imputing to her having had a child by A., this language the plaintiff's father repeated to A., who thereupon dismissed her from his service, alleging as a reason that although he knew the charge to be false, it would be injurious to the plaintiff and would be unpleasant both to the plaintiff and himself, A., that she should remain in the family, it was held that the dismissal was a natural consequence of the defendant's first publication, for which he was liable.[2] And so where the plaintiff was a clerk in the employment of C. & S., who were partners, and the defendant, a former employer of plaintiff, published to C., one of said partners, language imputing dishonesty to the plaintiff, this language C. repeated to S., his partner, and it was held the defendant was liable for the consequences of the repetition.[3] In each of the two cases lastly referred to, the court evidently having in view the supposed rule of law above referred to (§ 201), that special damage must be a *legal* consequence of the act complained of, lays a marked stress upon the fact that the repetition was privileged, that is to say that the father in the one case and the employer and partner in the other, was justified in making the repetition, and that in neither case could the plaintiff have maintained an action against the one making the repetition, and the whole tenor of these decisions leads to the inference that unless the repetition had been justifiable as regards the person making it, the defendant would not have been responsible for its consequences.[4] The repetitions, however, were justifiable

[1] Kendillon *v.* Maltby, 1 Car. & Marsh. 402.

[2] Gillett *v.* Bullivant, 7 Law Times, 490, and see Derry *v.* Handley, 16 Law Times, N. S. 263; *ante*, § 114, and note 1, p. 268, *ante*.

[3] Fowles *v.* Bowen, 30 N. Y. 22.

[4] "Occasions may doubtless occur

only in part ; they were justifiable as to the person making them, but not as to the first publisher; they illustrate the principle (§§ 67, 121) that one publisher may not be liable, while another publisher of the same subject-matter is liable. In the case of Ward *v.* Weeks,[1] above referred to, the court dwelt on the fact that the defendant had not requested the person to whom he made the publication to repeat the language, intimating, indirectly at least, that if the defendant had made such a request he would have been liable for the repetition ; most probably that would have been the result,[2] but such a request would not have justified the repetition (§ 67). It seems plain, therefore, that it is not the fact of the repetition being or not being justifiable that determines the liability of the first publisher, but the test in every case must be whether or not the repetition was a *natural* consequence of the first publication. The compliance with a request to repeat is a natural consequence of the request. It was natural and to be expected that a father, when told of the seduction of his daughter, should seek out the supposed seducer and tax him with his offense ; it was natural and to be expected that a partner, when informed that one in the employ of himself and partner was dishonest, should communicate the information to his co-partner, therefore it was that in both cases the first publisher was held to be liable for the repetition. Nor is there any inconsistency between these decisions and the decision in Parkins *v.* Scott, *supra*, for in that case although the repetition by the wife to the husband was a natural result of defendant's act, yet the husband's refusal, on that account, to consort with his wife was not a natural

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where the communication of slanderous words by a person who heard them will be *innocent;* and it is certainly reasonable that when repeated on such an occasion, and damages result, the first speaker should be held responsible for the damages as flowing directly and naturally from his own wrong." (Terwilliger *v.* Wands, 17 N. Y. 58, cited Fowles *v.* Bowen, 30 N. Y. 22.)

[1] 7 Bing. 211,

[2] Keenholts *v.* Becker, 3 Denio, 346.

consequence of the repetition. The husband being the legal protector of his wife, the natural consequence of her appeal to him would have been not to aggravate but to seek to redress her injury. The husband's desertion of the wife was not, therefore, under the circumstances, a natural consequence of the defendant's act.[1] There was this additional difficulty in the way of a recovery in that action: the damage for which the plaintiff sought compensation was really done by himself.

§ 203. We have already (§ 130) adverted to a distinction between language concerning a person and language concerning a thing. Thus far, in this chapter, we have confined ourselves exclusively to language concerning a person; our present business is with language concerning things. As respects language concerning things, no such distinction exists between the effect of oral and written language, as is maintained with respect to language concerning persons (§ 18). By things we intend whatever is external to the person; therefore, as here used, things include whatever one may or may be entitled to own, possess, or enjoy; also, his actions and creations.

§ 204. As a thing has no rights, and as no one owes any duty to a thing (§ 38), no wrong can be done to a thing, and language which merely concerns and affects a thing cannot be actionable *per se*. In other words, one may speak or write whatever he may please concerning a thing, and with any intention towards the thing, and for such speaking or writing no action can be maintained. The thing cannot complain; it has no rights to be invaded. But although things have no rights, persons may have a right in or to a thing—the right of property—and this right may be invaded by language concerning the

[1] For the same reason as that given for holding the act of a father not a natural consequence, page 268, *ante*, § 199.

thing.[1] When this invasion occurs, the language which affects a thing is actionable (§ 207). A loss of or injury to the property is not an invasion of the right of property, unless the loss is occasioned by a wrongful act (§§ 48, 49).[2] A loss occasioned by a lawful act does not amount to a wrong, and does not confer a right of action (§ 62). Where, therefore, by reason of an exercise of the right of speech or of writing concerning a thing, the owner of the thing sustains a loss, he cannot have any redress therefor, as no wrong has been done. But rights must be exercised in good faith; bad faith in an act done in the assumed exercise of a right makes the act wrongful (§§ 40, 42). Good faith, in this connection, means an *honest be-*

[1] Plaintiff purchased of defendant's agent goods, and advertised them for sale in a local paper as follows: "Shaw knit hose, navy blue, size 8 to 11; first quality goods, at 12½ cents per pair." Immediately thereafter defendant caused to be inserted in another paper published in the same town an advertisement as follows: "Caution! An opinion of Shaw's knit hose should not be formed from the advertisement of navy blue stockings as first quality by B. & Co. [plaintiff] at 12½ cents, since we sold that firm, at less than 10 cents a pair, some lots which were damaged in the dye house. (Signed,) Shaw Stocking Co." Held that the advertisement of defendant was not actionable. (Boynton *v.* Shaw Stocking Co. [Mass.] 15 No. East. Rep. 507; 38 Alb. Law J. 40.) Where defendant, through its officers and agents, represented that oils manufactured by plaintiff was of inferior quality, and threatened plaintiff's customers with law suits, and falsely represented to plaintiff's customers that plaintiff was infringing defendant's patents, &c., held a slander of plaintiff's business. (Buffalo Lubricating Oil Co. *v.* N. Y. Standard Oil Co. 42 Hun, 153.)

With some hesitation we conclude to give abridged the story of Old Mortality's [Robert Patterson] slander, related by Sir Walter Scott. Introduction to Old Mortality. Cooper Climent enjoyed almost a monopoly in Girthon for making and selling ladles, caups, bickers, bowls, spoons, &c., formed of wood. His wares when new imparted a reddish tinge to whatever was put into them. Some grandchildren of this Climent asked, in the hearing of Old Mortality, what use was made of the fragments of coffins thrown up in making new graves. Do you not know, said Old Mortality; they are sold to your grandfather to make into spoons, trenchers, &c. The children spread this abroad. It was supposed to account for the reddish tinge. The ware of Climent was generally rejected. He sought redress by citing Old Mortality to a court of justice. Climent proved that his ware was made from the wood of old wine casks, which accounted for the reddish tinge. Old Mortality declared his statement was but a jest; yet Climent's business languished, and he died in poverty.

[2] An action for words depreciating the value of plaintiff's property, held not to be an action in which the subject-matter was a thing affecting property within order 11 of the orders of court. (Casey *v.* Arnott, 2 C. P. D. 24; 25 Weekly Rep. 46.)

lief, with reasonable grounds for the belief,[1] *in the truth and fitness* for the occasion of the matter published, and bad faith is the converse of this; namely, the absence of such honest belief, or the *disbelief in the truth and fitness* for the occasion of the matter published (§ 241). As, then, the existence of this *belief* or of this *disbelief* determines whether the publication was or was not made with a legal excuse, for this purpose it becomes necessary to ascertain the belief of the publisher; and this involves the question of his intent in making the publication.[2] Not as already explained (§§ 90, 91), because the intent is essential to constitute a cause of action, but because it is a link in the chain of evidence of the existence or of the absence of a legal excuse. Proof that the publisher, while pretending to exercise the right of speaking or writing concerning a thing, was in reality designing and intending to injuriously affect the owner of the thing, while it would not of itself constitute bad faith, would be a circumstance from which bad faith might properly be inferred. Although the language concerns only a thing, yet if it appears to have been published without lawful excuse, *i. e.*, maliciously (§ 91), it will be actionable if pecuniary loss is a necessary or a natural and a proximate consequence of the publication,[3] and hence we may deduce this rule, that

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[1] An action for slander of title will not lie unless defendant's statements are not only untrue, but were made without reasonable and probable cause, and this applies not only to slander of title, properly so called with reference to real estate, but also to cases relating to personalty or personal rights or privileges. . . . (Bagally, L. J., Halsey *v.* Brotherhood, 19 Ch. Div. 389.)

[2] Upon demurrer to a complaint containing an allegation that defendant falsely and maliciously stated that plaintiff's title had been examined by four lawyers and pronounced bad, the court cannot refer to the statement as showing that it was made in good faith, the demurrer admitting that it was false and malicious. (Dodge *v.* Colby, 37 Hun, 515: 108 N. Y. 445.)

[3] "I am far from saying that if a man falsely or maliciously makes a statement disparaging an article which another manufactures or vends (although in so doing he casts no imputation on his personal or professional character), and thereby causes an injury, and special damage is averred, an action might not be maintained." (Cockburn, Ch. J., Young *v.* Macrae, 3 Best & Sm. 264; *ante*, note 6, p. 241.

The plaintiff, a grocer and draper,

language concerning a thing is actionable when published

complained that his wife assisted him in his said business, and that defendant maliciously published a charge of adultery against her whereby he, plaintiff, had been injured in his business by reason of his customers ceasing to deal with him as theretofore—held the action could be maintained. (Riding *v.* Smith, Law Rep. 1 Ex. Div. 91.)

In Swan *v.* Tappan, 5 Cush. 105, the words were "alleged to be of and concerning the plaintiff's books," and nothing else, without any allegation of special damage. The action was held not maintainable, but the court intimated that if special damage had been alleged the action could have been sustained. In Ingram *v.* Lawson (6 Bing. N. C. 212; 8 Scott, 471), it was held that the language was concerning the plaintiff personally, but that if the language had been concerning the plaintiff's ship, the action could have been maintained if special damage had been alleged. And as to words reflecting on a steamboat, see Hamilton *v.* Walters, 4 Up. Can. Q. B. Rep. O. S. 24, and in Yates' Pleadings and Forms, p. 436, is the form of a plea to a declaration for slander of the plaintiff's ship. In Young *v.* Macrae (3 Best & Sm. 264), Cockburn, Ch. J., observed: "I am far from saying there can be no action for a *false* reflection on goods. Such an action, however, would be more in the class of actions for false representations than actions of libel." An intentional false statement by defendant in regard to articles manufactured by plaintiff, for the purpose of preventing sales by plaintiff of such articles, and thereby preventing such sales, constitutes a cause of action. (Snow *v.* Judson, 38 Barb. 212, citing Benton *v.* Pratt, 2 Wend. 385; White *v.* Merritt, 7 N. Y. 352; Gallagher *v.* Brunel, 6 Cow. 346; and see Jenner *v.* A'Beckett, 25 Law Times, N. S. 464; West. Counties Manure Co. *v.* Lawes Chem. Manure Co. Law Rep. 9 Ex. 218.) Where defendant sold goods of a character similar to those manufactured by plaintiff, and so labeled as to show a design to induce a belief that the goods were those of plaintiff's manufacture, held that plaintiff could maintain an action for damages. (Miller Tobacco Factory *v.* Commerce, 45 N. J. L. [16 Vroom] 18.

A declaration for libel stated that the plaintiff, before and at, &c., carried on the business of an engineer, and was the inventor and registered proprietor (under 2 & 3 Vict. ch. 17) of an original design for making impressions on metal articles, and sold divers articles on which the design was used. That plaintiff, before and at, &c., had sold and had on sale in the way of his said trade, articles and goods called "self-acting tallow syphons, or lubricators," and that defendant published a libel of and concerning plaintiff, and of and concerning him in his said trade, and of and concerning said design, and plaintiff as the inventor, &c., thereof, and manufacturer of the articles with the said design thereon, and of and concerning the said goods which he had so sold and had on sale, and plaintiff as the seller, as follows: "This is to caution parties employing steam power from a person [meaning plaintiff] offering what he calls self-acting tallow syphons or lubricators [meaning said design, and meaning said goods and articles which he, plaintiff, had so sold and had on sale as aforesaid], stating that he is the sole inventor, manufacturer, and patentee, thereby monopolizing high prices at the expense of the public." R. Harlow [meaning defendant], "takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator," &c. "Those who have already adopted the lubricators [meaning, &c., same innuendo as before] against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed." No direct averment connected the tallow syphon with the registered design mentioned in the first part of the inducement. No special damage was alleged. Held, that the words were not a libel on the plaintiff, either generally or in the way

maliciously, *i. e.*, without lawful excuse (§ 91), if it also occasions damage to the owner of the thing (§ 146).

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of his trade, but were only a reflection upon the goods sold by him, which was not actionable without special damages. (Evans *v.* Harlow, 5 Q. B. 624.) See *post*, note to § 206 *c*.

Publishing of a newspaper that it was a vulgar, ignorant, and scurrilous journal, was held not actionable, but it was held actionable to say that it was low in circulation—such a charge being calculated necessarily to produce damage. (Heriot *v.* Stuart, 1 Esp. Cas. 437.) Held actionable to publish that a newspaper had a separate page devoted to advertisements of quack doctors, &c., and that the publisher takes advertisements at a reduced rate for advertising on that page. (Russell *v.* Webster, 23 Week. Rep. 59.) See Latimer *v.* West. Morning News Co. 25 Law Times, N. S. 44. That case arose as thus: On the occasion of an agricultural show at G., the defendant, The Western Morning News Company, published an article saying that in the show yard an audacious attempt to obtain money by false pretenses had been detected and exposed, to wit, that a certain newspaper "of limited circulation, published in a town remote from" G., has inserted, without any order to do so, columns of advertisements referring to the implements on view, copied from other newspapers to which advertisements have been given, or from papers of a year ago, and alleging that the object of plaintiff was to swell the number of advertisements in the paper, and to inveigle the manufacturers into payment by subsequently sending in bills for these spurious advertisements. Subsequently, the defendant published that plaintiff had inserted advertisements without orders, with no expectation of being paid therefor, and concluded, "We would not question our contemporary's own assessment of the value of its columns as an advertising medium, and no doubt the public will appreciate it at the same cypher." Plaintiff had a verdict.

Plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in chancery, to which plaintiff had demurred. Held, that, without alleging special damage, plaintiff could not sue the defendant for falsely publishing that the demurrer had been overruled; that the prayer of the petition (for the appointment of a receiver) had been granted, and that persons duly authorized had arrived at the mine. Held, also, that an allegation that the plaintiff was injured in his rights, that the shares were lessened in value, that divers persons believed that he had no right to the shares, that the mine could not be worked, and that he had been prevented from disposing of his said shares, and from working the mine in so ample a manner as he otherwise would have done, and was prevented from gaining divers profits which would otherwise have accrued to him, was not a sufficient special damage. (Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Scott, 723.)

In an action for misdescribing the plaintiff's vessel in a publication of the defendants, called "The Shipping Register," it appearing that the plaintiffs had requested the surveyor of the defendants to examine the ship, held that they could maintain no action against them for what they did in consequence of his report; the remedy was against him if he made a false report. (Kerr *v.* Shedden, 4 C. & P. 528.)

The foregoing cases seem to imply that the fact of loss, or special damage, as it is termed, will alone render actionable language concerning a thing; we state it otherwise in the text, and we suppose it to be otherwise. In Carr *v.* Hood, 1 Camp. 355, note, Lord Ellenborough, speaking of language concerning a thing (a book), says: "I speak of fair and candid criticism; this every one has the right to publish, although the author may suffer loss from it. Such a loss the

§ 205. Malice and damage are both essential requisites to sustain an action for language concerning a thing.[1] To these requisites is usually added a third, that the language must be false. It is true the language must be false, not because it is an additional requisite to malice and damage, but because it is comprised in the requirement of damage. Language concerning a thing which is not false, *i. e.*, which is true, cannot, as a necessary or natural consequence, occasion pecuniary loss. Language concerning a thing is *prima facie* or presumptively lawful; and, therefore, with regard to it, there is no assumption or presumption of its being untrue nor of its being false, nor of its occasioning damage, nor of its being without lawful excuse (malicious) (§ 130); and therefore it is, that one complaining of an injury by reason of language concerning a thing, in order to establish his right to maintain an action, has to allege and prove that the publication was made without lawful excuse (maliciously), that the language was untrue, and that he has sustained pecuniary loss as a necessary or as a natural and a proximate consequence of the publication.[2]

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law does not consider as an injury, because it is a loss which the party ought to sustain."

This subject is further considered under the head of Defenses, § 254.

[1] Hovey *v.* Rubber Tip Co. 57 N. Y. 119; 33 Superior Ct. R. (1 Jones & S.) 522; and see Kennedy *v.* Press Pub. Co. 3 N. Y. State Rep. 139; 41 Hun, 422; Gordon *v.* McGibbon, 3 Pug. N. Bruns. 49. Defendants sent out a circular charging that the publication of certain books by plaintiff infringed a copyright. Defendant also advertised editions of two works they were about to publish, as follows: "They contain all the revisions made by Mr. Longfellow in later years, and are the only authorized cheap editions in the market." Plaintiff having published what it termed reprints of early editions of said work, sued to recover damages sustained by reason of said circular and advertisement. Held, the action was in the nature of an action for slander of title, and was to be determined by the rules applied in such an action, and that to sustain the action, actual malice in publishing the circular and advertisement must be shown. (Lovell Co. *v.* Houghton, 54 Superior Ct. R. [22 J. & S.] 60; and see *ante*, note 2, p. 112, *ante*.)

[2] The action for slander of title is maintainable only by one who possesses an estate or interest in the property (Edwards *v.* Burris, 60 Cal. 157), and where the complaint shows affirmatively that plaintiff was not owner at time of alleged slander of title no cause of action appears. (*Id.*)

§ 206. What is ordinarily designated slander of title, is comprised within the division of language concerning things. Slander of title is publishing language, not of the person, but of his right or title to something. All the preceding observations upon language concerning things apply to actions for slander of title; thus, in an action for slander of title, no distinction is made with regard to the medium of the publication, as whether oral or written;[1] and to sustain the action the publication must be made maliciously; the language must be false, and must occasion, as a natural and proximate consequence, a pecuniary loss, *i. e.*, special damage to the plaintiff.[2] The special damage[3] usually consists in losing the sale of the property in question. This damage can occur only in the cases where no contract to sell exists, *i. e.*, to cases where one is, by the language published, deterred from making a purchase, or entering into a contract to purchase. Where a contract for sale and purchase has already been entered into, the purchaser's refusal, on account of any statement of a third party, to

[1] Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Scott, 723; West. Counties Manure Co. *v.* Lawes Chemical Manure Co. Law Rep. 9 Ex. 218.

[2] Kendall *v.* Stone, 5 N. Y. 14; rev'g S. C. 2 Sandf. 269; Like *v.* McKinstrey, 41 Barb. 186; affi'd 4 Keyes, 397. There must be malice which the plaintiff must prove. (Smith *v.* Spooner, 3 Taunt. 246; Hill *v.* Ward, 13 Ala. 310; Stark *v.* Chetwood, 5 Kansas, 141.) Malice is not to be presumed. (McDaniel *v.* Beca, 2 Cal. 326.) There must be malice either express or implied. (Hargrave *v.* LeBreton, 4 Burr. 2422.) But all malice is implied. (§ 87, *ante*.) To support an action for slander of title, special damage must be shown. (Bailey *v.* Dean, 5 Barb. 297; Linden *v.* Graham, 1 Duer, 670; Watson *v.* Reynolds, 1 Mo. & Malk. 3; Paull *v.* Halferty, 63 Pa. St. 46; and see § 206*b*, *post*.) There must, too, be a want of probable cause; and if what the defendant said or did was in pursuance of a claim of title, for which he has some ground, he is not responsible. (Bailey *v.* Dean, 5 Barb. 297; Stark *v.* Chetwood, 5 Kansas, 141.) The existence of probable cause is no answer to the action, nor does the want of it necessarily prove malice. (Kendall *v.* Stone, 2 Sandf. 269.) Mere assertions, threats, and designs, made against a grantee of real estate, and against the party in possession, cannot be deemed a cloud upon the title. If the owner is injured by any such false claims or representations, he can probably maintain an action for damages. (*Re* Madison Ave. Bapt. Church, 26 How. Prac. R. 72.)

[3] Kendall *v.* Stone, 5 N. Y. 14. Plaintiff alleged he was prevented from selling his mine by the misrepresentations of the defendant to the proposed buyer, that an expert was of opinion that said mine was but a pocket that would soon run out; *held* plaintiff might recover. (Paull *v.* Halferty, 63 Pa. St. 46.)

complete his contract, would not in an action against such third party, for making such statement, constitute special damage![1] A man may refuse to bid for property upon which, or upon the title to which, an imputation rests; such refusal is a *natural consequence* of the imputation; but one who is already under a contract to purchase may not (has not the right to), by reason of any imputation on the subject of such contract, refuse to complete; besides that his refusal would be illegal, it would not be a *natural consequence* of the imputation. Perhaps this rule is applicable only to the slander of title to real estate, and in the cases where the title is capable of such clear proof as to outweigh any imputation against it, but in the case of title to personal property, the title to which is not capable of such satisfactory proof as is the title to real property, a different rule may prevail, for in such a case it would seem to be but a *natural consequence* that one under contract to purchase should be deterred from completing by reason of imputations upon the seller's title, just as in the case of the contract to deliver battens the seller was deterred from delivering them by reason of the defendant's claim of lien.[2] (§ 206*b*.)

§ 206 *a*. Where the assignee of a lease which contained a proviso for re-entry in case the rent reserved by it

[1] Loss of a purchaser held to be special damage. (Collins *v*. Whitehead, 34 Fed. Rep. 121; Van Tuyl *v*. Riner, 3 Bradw. [Ill.] 556; Wilson *v*. Dubois, 35 Minn. 471.) But delay in consummating the sale, or *general* depreciation in value is not enough. (Bonanza Development Co. *v*. Hayes, 5 Month. Law Bul. 28.) Where the special damage alleged is the loss of the sale of the property, evidence of its value as a scientific curiosity, or for exhibition is immaterial. (Gott *v*. Pulsifer, 122 Mass. 235.)

[2] Green *v*. Button, 2 Cr. M. & R. 707. See § 201, *ante*. Where a binding contract for the sale of certain property has been made and the purchaser is induced to refuse to complete the purchase by reason of slanderous words uttered by a third person concerning the property, the vendor cannot maintain an action for slander against said third party. His remedy is on the contract of sale. (Brentman *v*. Note, 3 N. Y. Suppl. 420.) And where E., an attorney, had a contract with A. to bring an action for him, B., with that knowledge, slandered E. to A., in consequence of which A. broke the contract, held action would not lie. (Ensor *v*. Bolgiano, 67 Md. 190. See, however, note to § 206*b*, *post*.)

was in arrear, exposed the lease for sale, there being at the time rent in arrear, the lessor appeared at the time and place appointed for the sale, and announced that such assignee had no title and could not make a title, in consequence of which announcement, persons who came to bid for the lease refused to bid; the lessor afterwards offered £100 for the lease, which was refused; he brought ejectment and recovered the possession of the premises. Intermediate the attempted sale and the recovery in the ejectment, the assignee sued the lessor for slander of title; the court on the trial was of opinion that, under the circumstances, the plaintiff could not maintain the action, but left the question of malice in making the publication to the jury, and they found that it was malicious. The court, however, directed a nonsuit.[1] It is supposed that the nonsuit was set aside, and that the plaintiff had judgment on the ground that the question of malice having been left to the jury as a question of fact, and found against the defendant, the court could not disregard the finding and say there was no malice.[2] The defendant, a surveyor appointed under Stat. 7 and 8 Vict., ch. 84, attended a sale of some unfinished houses, of which the plaintiff was the lessee for a term of years. The roadway to these houses, although of sufficient width according to the above statute, was at that time in an unpaved state and unfit for traffic. At such sale the defendant made the following announcement: "I shall not allow the houses to be finished until the roads are made good. I have no power to compel any one to make the roads, but I have power to stop the buildings until the roads are made." Some time after such sale, the defendant, on being asked

[1] Smith *v.* Spooner, 3 Taunt. 246. The attorney of a party who would be justified in making objections to a title, is not liable to an action, if he *bona fide*, though without authority, state only what his principal might have stated. (Watson *v.* Reynolds, 1 M. & Malk. 3.)

[2] 1 Starkie on Slander, 318.

why he pursued Mr. Pater, replied, "I pursue Mr. Pater because I am not able to pursue Mr. Agar, the ground landlord." Upon this state of facts, held, that there was no evidence to support the allegation of malice.[1] Where one mortgaged his estate, and afterwards committed an act of bankruptcy, subsequently the property was offered for sale by the assignee of the mortgagor, the defendant, the attorney of the mortgagee, stopped the sale by stating that the mortgagor had committed an act of bankruptcy, and which was untrue, that a docket had been out for a commission; in an action for losing the sale, held that although the defendant went beyond the truth, there was no material variance and no difference made with respect to plaintiff's title, and there being no proof of malice, the action could not be maintained.[2] The plaintiff being about to sell an estate, the defendant wrote a letter to the intending purchaser, imputing insanity to Y., the person from whom the plaintiff derived his title and stating that the title would be disputed; in consequence of which letter the proposed purchaser refused to purchase. It appeared on the trial that Y. had married a sister of the defendant, and that a term of years in the estate in question was vested in the defendant as trustee, to secure a jointure to Y.'s wife. The judge on the trial ruled that if defendant believed, upon *such grounds as would persuade a man of sound sense and knowledge of business*, that Y. was insane, the defendant would be entitled to a verdict. A verdict was taken for the plaintiff; the court above, on granting a new trial, condemned this ruling as unsound and stated, "If what the defendant wrote was most untrue, but nevertheless *he believed it*, if he was acting under the most vicious of judgments, yet if he exercised that judgment *bona fide*, it was a sufficient

[1] Pater *v.* Baker, 11 Jurist, 370; 16 Law Jour. R. 124 C. P.; 3 C. B. 831.

[2] Hargrave *v.* Le Breton, 4 Burr. 2422.

justification. . . . The jury must arive at their conclusion through the medium of malice or no malice in the defendant. The *bona fides* of the publication, and not what a man of rational understanding would have done, is the question to be canvassed."[1] The defendant, who was the ground landlord and remainderman of leasehold premises, of which the plaintiff was assignee of the lessee, stated at an auction at which the lease and assignment were put up for sale, that *all* the covenants in the lease had been broken, that he had commenced ejectment to recover the possession of the premises, and that it would cost £70 to repair the premises, in consequence of which the lease brought less than it otherwise would. On the trial it appeared that *some only* of the covenants in the lease had been broken, and the judge directed the jury that the only question was whether what the defendant stated was untrue, and if it was, the plaintiff was entitled to recover. The jury found for plaintiff, and gave £40 damages. On motion for a new trial, the ruling at the trial was held erroneous, and that the proper question was whether so much of the defendant's statement as was false was also malicious.[2] Where the plaintiff, as administratrix, was about to sell leasehold property, defendant, after being informed by the attorney of the plaintiff that there was no will of the decedent, issued an advertisement offering a reward for the will of such decedent, held, the question was whether he had "a sincere and genuine belief that there was a will."[3] A. died possessed of furniture in a beer-shop. His widow, without taking out administration, continued in possession of the beer-shop for three or four years, and then died, having, whilst so in possession, assigned all the furniture by bill of sale to her landlords, by way of security for a debt

[1] Pitt *v.* Donovan, 1 M. & Sel. 639.

[2] Brook *v.* Rawl, 4 Exch. 521; and see Goulding *v.* Herring, 1 Rolle R. 141.

[3] Atkins *v.* Perrin, 3 Fost. & F. 180.

she had contracted with them. After the widow's death, the plaintiff took out letters of administration to the estate of A., and informed the defendant, the landlords' agent, that the bill of sale was invalid, as the widow had no title to the furniture. Subsequently the plaintiff was about to sell the furniture by auction, when the defendant interposed to forbid the sale, and said that he claimed the goods for his principals under a bill of sale. On proof of these facts, in an action for slander of title, the plaintiff was nonsuited: held, that the mere fact of the defendant's having been told before the sale that the bill of sale was invalid, was no evidence of malice to be left to the jury, and that the plaintiff was, therefore, properly nonsuited.[1] An order having been made by the Court of Chancery, requiring G., the plaintiff, to pay a sum of money, the defendant registered the order pursuant to statutes 1 and 2 Vict., ch. 110, whereby it became a lien on the real estate of the plaintiff, and prevented him raising, by a sale or mortgage of his estate, the money ordered to be paid, held the action could not be maintained, there being no proof of malice.[2] And where the defendant published a notice cautioning all persons not to purchase of the plaintiff a certain tract of land, alleging that the plaintiff obtained the title to said land from the defendant by means of false pretenses, and that the defendant intended to institute a suit to annul plaintiff's pretended title, it was held not on its face to show malice.[3]

§ 206 *b*. Some of the old cases hold that one, by claiming title in himself, cannot give a right of action for slander of title; that to render the claim actionable, it must

[1] Steward *v.* Young, Law Rep. 5 C. P. 122.

[2] Gibbs *v.* Pike, 1 Dowl. N. S. 409; 6 Jur. 465; and see Collins *v.* Whitehead, 34 Fed. Rep. 121.

[3] McDaniel *v.* Baca, 2 Cal. 326. Where the complaint alleges malice, if the defendant demurs he admits the malice. (See Dodge *v.* Colby, 37 Hun, 515; 108 N. Y. 445; 37 Alb. L. J. 340; Hammond *v.* Hussey, 51 N. H. 40.)

assert a title in a stranger.[1] This distinction no longer prevails.[2] So, formerly, it seems to have been supposed that the only ground of damage was a loss of the sale or leasing of the property, the title to which was assailed; it is, however, well settled at this day that any loss which is a natural and proximate consequence of the language is damage.[3] The action cannot be maintained unless there is *special* damage.[4] Where, prior to the publication of the language complained against, the plaintiff and one W. had contracted for the sale of a lot of land—in consequence of the publication W. wished to be released from his contract, and plaintiff released him—plaintiff sued, charging the loss of a sale to W. as the special damage, held that the rescinding of the contract with W. was not special damage, and that no action could be maintained.[5] But where plaintiff had borrowed a sum of money of defendant, and afterwards plaintiff bought spruce battens of A., and before delivery of the battens, defendant gave notice to A. not to deliver them, and that he, plaintiff, had a lien upon them, in an action by plaintiff, alleging that the defendant falsely claimed such lien, and that, by reason of such notice and pretense of lien, and non delivery of said battens, he had lost the use of them, and been hindered in building

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[1] Jenkins Cent. 247; Pennyman *v.* Rabanks, Cro. Eliz. 427; Lovett *v.* Weller, 1 Rolle R. 409; Gerard *v.* Dickinson, 4 Coke, 18; Sneade *v.* Badley, 3 Bulst. 75; S. C. 1 Rolle R. 244; and see Vin. Abr. Act. for Words, L, B, 2, 8; Anon. Sty. 414; Boulton *v.* Shields, 3 Up. Can. Q. B. 21.

[2] See, however, Dodge *v.* Colby, 37 Hun, 515.

[3] Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Sc. 723; Tasburgh *v.* Gray, Cro. Jac. 484. No action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house, and thus prevents the renting. Heywood *v.* Tillson, 75 Me. 225; see, upon this case, 34 Alb. L. J. 162.

[4] Watson *v.* Reynolds, 1 Mo. & Malk. 1; Lowe *v.* Hammond, Sir W. Jones, 196; S. C. *sub. nom.* Law *v.* Hammond, Cro. Car. 141; Pal. 529; Cane *v.* Goulding, Sty. 169; Sneade *v.* Badley, 3 Bulst. 75; S. C. 1 Rolle R. 244; Brook *v.* Rawl, 4 Exch. 521; Pater *v.* Baker, 3 C. B. 831; West *v.* Callaghan, 38 Leg. Int. 102; Wilson *v.* Dubois, 35 Minn. 471. In the absence of an allegation of special damage the complaint is demurrable. (*Id.*) And *ante* in note 3, p. 284.

[5] Kendall *v.* Stone, 5 N. Y. 14; rev'g S. C. 2 Sandf. Superior Ct. R. 269. See *ante*, p. 285.

certain houses, it was objected that there being a valid contract with A., if plaintiff had suffered any damage by reason of the non-delivery of the battens, he must look to A.; that the non-delivery was an illegal act for which the defendant was not liable; but the court held otherwise, and sustained the action.[1] Perhaps plaintiff being prevented from raising money by mortgage on his lands, is such damage as may entitle him to maintain an action.[2] Where the alleged slander consists in the defendant claiming title in himself, the fact of his not having a title is not *per se* evidence of malice.[3] But the defendant having no title is a circumstance from which malice may be inferred.[4] Where the defendant in fact made the publication under the advice of counsel, but did not, at the time of making the publication, state that he was acting under such advice, held that the fact of his acting under such advice did not *per se* shield him from an action;[5] but it was a circumstance to be considered in determining whether or not the publication was made maliciously.[6]

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[1] Green *v.* Button, 2 Cr. M. & R. 707. As to maintaining an action for maliciously causing one of two contracting parties not to perform his contract with the other, and thereby occasioning him loss, see Lumley *v.* Gye, 2 El. & B. 216; Lumley *v.* Wagner, 1 De G. M. & G. 604; approved, Bowen *v.* Hall, 6 Q. B. D. 233; Tarleton *v.* McGawley, 1 Peake, 207; Taylor *v.* Neri, 1 Esp. 386; 3 Smith Leading Cases, 9 Am. from 9 Eng. ed., and notes, p. 1827. See note 2, p. 285, *ante*.

[2] Linden *v.* Graham, 1 Duer, 670. In that case the plaintiff was defeated erroneously, as we suppose, because the damage was not stated with sufficient certainty in the complaint. This want of certainty was a ground for making the complaint more definite, but not, as we think, for holding the complaint insufficient. As to how the damage must be alleged, see Malachy *v.* Soper, 3 Bing. N. C. 371; Tilk *v.* Parsons, 2 Car. & P. 201; Delegall *v.* Highley, 8 Car. & P. 444; Wilson *v.* Dubois, 35 Minn. 471. A general allegation that the plaintiff's property has been lessened in value, or that people believe he has no title, or that he has been prevented from selling, is not sufficient. (See §§ 329, 369, *post*.) Where the declaration alleged: whereby M. was prevented from completing his contract for the purchase of said land from plaintiff, and plaintiff lost the sale of said land and the use of the purchase-money thereof, and has been unable to sell said land, and has been put to great expense in quieting the title to said land, it was held to be a sufficient averment of special damage. (Ashford *v.* Choate, 20 Up. Can. C. P. Rep. 471.)

[3] Hill *v.* Ward, 13 Ala. 310; Sully *v.* Spearing, 4 So. Rep. 489.

[4] McDaniel *v.* Baca, 2 Cal. 326.

[5] Like *v.* McKinstry, 41 Barb. 186; affi'd 4 Keyes, 397; and see Hill *v.* Ward, 13 Ala. 310.

[6] Hill *v.* Ward, 13 Ala. 310.

§ 206 *c.* The action for slander of title is not restricted to language affecting real property, it lies for slander of title to personal property; thus, where at a public sale of rye the defendant attended, and in the presence and hearing of the persons there assembled, said: "I forbid selling the rye; it is mine," in consequence of which persons were deterred from bidding, and the rye sold for less than it would otherwise have done, it was held an action could be maintained.[1]

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[1] Like *v.* McKinstry, 41 Barb. 186; affi'd 4 Keyes, 397; and see Gutsole *v.* Mathews, 1 M. & W. 495; 1 Tyrw. & Gr. 694; Green *v.* Button, 1 Gale, 349; 2 C. M. & R. 707; 1 Tyrw. & Gr. 118; Malachy *v.* Soper, 3 Bing. N. C. 371; 3 Scott, 723; Rowe *v.* Roach, 1 M. & S. 304; Carr *v.* Duckett, 5 Hurl. & N. 783; Hill *v.* Ward, 13 Ala. 310; and slander of title to a slave. (Ross *v.* Pines, Wythe, 71.) An action was maintained for alleging that plaintiff's machines were an infringement on defendant's patents. (Wren *v.* Weild, Law Rep. 4 Q. B. 213.) "Caution. To all who may be arranging with J. M. Cousins for his self-acting pump, who claims to have patented same in April last. I wish to caution the public against having anything to do with Cousins or his pumps, it being an infringement on my patent obtained in 1858. I intend to prosecute him immediately. Beware of the fraud and save costs," held, besides being a slander of plaintiff's title, to amount to a libel of him individually. (Cousins *v.* Merrill, 16 Up. Can. C. P. 114.) Defendants issued a circular stating that they were unable to supply a particular electric bell (for which plaintiff had obtained protection), as it had "been proved to be an infringement of another patented bell." The fact was that prior to the issue of the circular, no proceeding had been commenced against plaintiff respecting his bell. An action was afterwards commenced, and then abandoned. Held, there was no reasonable and probable cause for the statement in the circular. (Crampton *v.* Swete & Main, 58 Law Times, 516.)

Every man has a right to say, "I am the proprietor of such and such a print, and I warn all the world, and you in particular, not to pirate it;" "We warn you that a certain reproduction of it is a piracy," although he may be wrong in law with respect to its being a *piracy*. "I think his saying so would not be actionable, because a man is not bound to be correct in his statement of the law, though he is bound to be correct in his statement of fact." A man may intend to state the law, and yet so state it as to appear to be stating a fact, and if he does this he is responsible. (Bramwell, L. J., Dicks *v.* Brooks, 15 Ch. Div. 39; cited and approved, Halsey *v.* Brotherhood, 19 Ch. Div. 391; see, also, Rollins *v.* Hicks, Law Rep. 13 Eq. 355; Axmann *v.* Lund, Law Rep. 15 Eq. 330; Hastings *v.* Giles Litho. Co. 21 N. Y. St. Rep. 268.)

Plaintiffs, vocalists, advertised as follows: "The Sisters Hartridge have pleasure in thanking Chappel & Co. (music publishers) and others for their permission to sing any morceaux from their musical." Defendant, who was interested as agent for the proprietors of the "stage right" of certain songs published by the firms mentioned, wrote the proprietors of two music halls at which plaintiffs were engaged to sing, to the effect that the advertisement, if relied upon in every particular, was calculated to lead them to incur penalties under the copyright act, inasmuch as the publishers named had in some instances no power to

§ 207. As one cannot cloak his wrong-doing by the use of ironical language (§ 133), so neither can one with impunity attack a person by *pretending* to attack a thing; for although the words may be professedly concerning a thing, yet if in reality they concern a person, they will be judged by the rules governing language concerning the person.[1] Whether certain language concerns a person or a thing is sometimes a question difficult to determine; but it is always a question of fact, and like every other question of fact, is to be determined sometimes by the court and sometimes by the jury (§ 69).[2] The language

give the alleged permission, and insinuating that music hall singing was not calculated to create a demand for their musical publications. Upon a motion to set aside a nonsuit, it was held that, inasmuch as the letters were reasonably susceptible of a construction which would make them libelous, the opinion of the jury ought to have been taken upon their meaning. (Hart *v.* Wall, Law Rep. 2 C. P. 146.) An action was maintained for saying of the plaintiff's stallion that it had the venereal disease. (Wier *v.* Allen, 51 N. H. 177.) In Wilson *v.* Dubois (35 Minn. 471), the plaintiff alleged he was prevented selling his horse by reason of defendant's statement that the horse was 21 years old, whereas it was not more than 12 years old. His suit failed for a defect in his pleading. See *ante*, note 1, p. 284. In an action for slander to title of personal property, plaintiff can recover only such damages as are specifically alleged. (Childs *v.* Tuttle, 48 Hun, 228.)

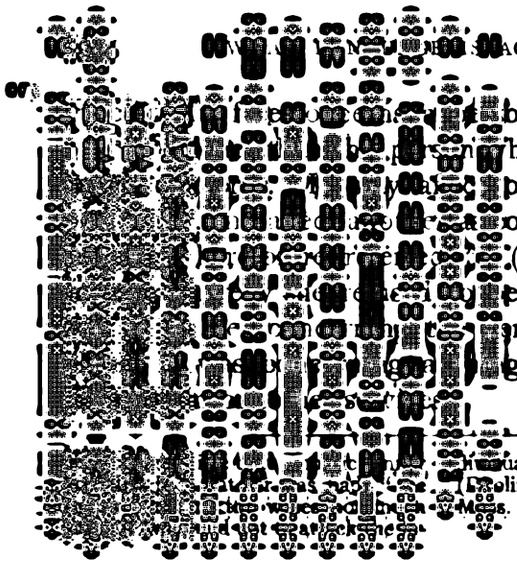
[1] Carr *v.* Hood, 1 Camp. 355, *n.* An employer may have an action for language injurious to him in his business, although the language directly points to a person in his employ and not to himself; and the owner of a chattel may sue for injury to his business by language respecting such chattel, but necessarily referring to the owner. (Harnett *v.* Wilson, 1 Victoria Law Times, 45; and see Riding *v.* Smith, Law Rep. 1 Ex. Div. 91.) In Tobias *v.* Harland, 4 Wend. 537, the court said that words disparaging an article made or dealt in by the plaintiff, were not actionable unless they imputed deceit or malpractice in the making or vending, or a want of skill in the manufacturing. In reference to this dictum it must be observed that words imputing to plaintiff deceit or want of skill do not concern the thing, but the person, and are therefore within the rules relating to personal defamation. (See Kennedy *v.* Press Pub. Co. 3 N. Y. State Rep. 139; 41 Hun, 422; Latimer *v.* West. Morning News Co. 25 Law Times, N. S. 44.)

As to pleas in actions for slander of title, see Mair *v.* Culy, 12 Up. Can. Q. B. 71; Boulton *v.* Shields, 3 *Id.* 21; Crean *v.* Gamble, 7 Ir. Jur. N. S. 531.

Exemplary damages in an action for slander of title. (Van Tuyl *v.* Riner, 3 Bradw. 556.)

Bill of particulars in action for slander of title. (Childs *v.* Tuttle, 48 Hun, 228.)

[2] A cut or picture of the interior of a saloon, with "Kennedy's" beneath, together with an article, which, taken in its strongest sense, with innuendoes, was a charge that the saloon was the resort of improper characters, the associations bad, &c., without other mention of the plaintiff, held, a libel on the place and not on plaintiff. (Kennedy *v.* Free Press Pub. Co. 41 Hun, 422.) And charging in a



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CHAPTER IX.

DEFENSES.

Privileged publications generally—Repetition—Truth—Legislative proceedings and reports thereof—Judicial proceedings—Parties to proceedings—Counsel—Witnesses—Judges—Grand jurors—Reports of judicial proceedings—Quasi judicial proceedings—Church discipline—Seeking advice or redress other than judicially—Giving information or advice generally—Attorney and client—Master and servant—Candidates for office or employment—Insanity—Drunkenness—Infancy—Accord and satisfaction—Previous recovery—Apology—Freedom of the press—Criticism.

§ 208. The actionable language referred to in the preceding chapter is to be understood as *prima facie* actionable only, that is to say, it is actionable when published without any legal excuse for making the publication.[1] We have, in previous chapters (§§ 64, 65), referred to the kinds of legal excuses, and the distinction between legal excuses and defenses, and (§ 50) stated that it is the occa-

[1] To every libel there may be an implied justification from the occasion. (Weatherstone *v.* Hawkins, 1 T. R. 110.) But "there are some libels it is impossible to justify." (Pollock, Ch. B., Darby *v.* Ouseley, 25 Law Jour. 227, Ex.) In that case the charge was that plaintiff was a Roman Catholic, and necessarily "a traitor," and held, a plea of justification could not *possibly* be supported. "Whether the circumstances under which a communication is made constitute it a privileged communication or not, is a question which the court has assumed the jurisdiction to decide. But it is more a question of fact in each particular case than a question of law. The court is to consider whether the occasion is such as to make the communication one of a privileged character. That being so, it by no means follows that we can derive much aid in one case from another the circumstances of which are not exactly the same." (Maule, J., Wenman *v.* Ash, 13 C. B. 836; and see Darby *v.* Ouseley, 1 Hurl. & N. 1.)

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his private character.
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unications privileged from being
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see remarks of Bushe, C. J.,
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Warner *v.* Paine, 2 Sandf. 198.
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And each of these publications may be again divided into such as are privileged as to the *matter* published, and such as are privileged as to the *manner* of the publication. By an absolutely privileged publication is not to be understood a publication for which the publisher is in no wise responsible; but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of *slander* or *libel*. A conditionally privileged publication is a publication made on an occasion which furnishes a *prima facie* legal excuse for the making of it; and which is privileged, unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse. The additional fact which, in the majority of cases, is required to be shown to destroy this conditional privilege is malice, meaning bad intent in the publisher, *i. e.*, an intent to injure the person whom or whose affairs the language concerns;[1] and, therefore, by a conditionally

judicial proceeding; and publications duly made in the ordinary mode of parliamentary proceedings. (White *v.* Nicholls, 3 How. U. S. Rep. 266.) Absolutely privileged communications are of two kinds: (1.) Proceedings in courts of justice; (2.) Memorials and petitions to the legislature. (Cook *v.* Hill, 3 Sandf. 341.) Courts are not inclined to extend the doctrine of absolutely privileged communications. (*Id.*) A conditionally privileged publication must be made "in good faith, believing the statements it contains to be true, or having probable cause to believe them to be true." If there was no probable cause of the communication, the law implies that it was made with malice. If, however, it appears that there was probable cause, the communication is privileged, no matter how much actual malice dictated it. (*Id.*) "Privilege is often used very loosely and inaccurately." (Bramwell, Ld. J., Stevens *v.* Sampson, L. R. 5 Ex. D. 53 [App.].)

[1] Malice here means some motive actuating defendant different from that which, *prima facie*, rendered the statement privileged. (Fahr *v.* Hayes, 50 N. J. L. [21 Vroom] 481.) In such cases malice is not inferred from the mere fact that the words spoken are false. (Decker *v.* Gaylord, 35 Hun, 584; Templeton *v.* Graves, 59 Wis. 95; and see *post*, § 389.) In Wakefield *v.* Smithwick, 4 Jones (N. Car.), 327, by Pearson, J.: "The defense under the doctrine of privileged communication is much broader, and much more favorable to defendant [than a justification], for if he succeeds in proving such a relation between himself and the person to whom the communication is made as *authorizes* him to make it, the burden is upon the plaintiff to prove that it was not made *bona fide* in consequence of such relation, but out of malice, and that the existence of such relation was used as a mere cover for his malignant designs. When, however, plaintiff shows that the matter communicated was false, the question of

enerally understood one malice, meaning absence where no legal excuse is ct of publication.[1] The communication is, "that ade rebuts the inference ement prejudicial to the uts it upon him to prove the defendant was actu- and ill will independent the communication was hat: "Instead of the ex-

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El. N. S.] 308; Kine *v.* Sewell, 3 & W. 297; Swan *v.* Tappan, 5 h. 104.) "A communication, to privileged, must be made upon a per occasion, from a proper motive, must be based upon reasonable probable cause. When so made ood faith, the law does not imply ice from the communication itself, n the ordinary case of libel; actual ice must be proved before there be a recovery. And whether a munication be privileged or not is estion for the court, not the jury." ggs *v.* Garrett, 111 Pa. St. 404; roved, Press Co. *v.* Stewart, 119 n. St. 584, reversing Stewart *v.* ss Co. 1 Pa. C. C. Rep. 247; and Carpenter *v.* Bailey, 56 N. H. 283; ek *v.* Newlands, 4 Vict. Law Rep. 412; Locke *v.* Bradstreet Co. 22 Rep. [Minn.] 771; Neeb *v.* Hope, Penn. St. 145.)

Klinck *v.* Colby, 46 N. Y. 427; ore *v.* Manuf. Bk. 21 N. Y. St. 653. The N. Y. Penal Code nes a privileged communication s: § 253. A communication made person entitled to or interested in communication, by one who was interested in or entitled to make or who stood in such a relation to former as to afford a reasonable and for supposing his motive in- ent, is presumed not to be mali- s, and is called a privileged com- nication.

pression 'privileged communication,' it is more correct to say, that the communication was made on an occasion which rebuts the presumption of malice."[1] The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts the burden upon him to prove malice in fact, *i. e.*, that the defendant was actuated by motives of personal spite or ill-will, or of culpable recklessness or negligence.[2] The description of cases recognized as privileged communications must be understood as exceptions to the rule (that every defamatory publication implies malice), and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and, therefore, *prima facie* relieves it of the implication from which the general rule of law is deduced. The rule of evidence, as to such cases, is, accordingly,[3] so far changed as to impose on the plaintiff the onus of rebutting those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the

[1] Erle, J., Gilpin *v.* Fowler, 9 Ex. 615.

[2] Wright *v.* Woodgate, 2 Cr. M. & R. 573; Briggs *v.* Garrett, 111 Penn. St. 404: The State *v.* Banner Pub. Co. 16 Lea (Tenn.), 176; Robinson *v.* Hatch, 55 How. Pr. R. 55. Where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has by his situation to protect the interest of that person, that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer be actuated by malice. (Cockayne *v.* Hodgkisson, 5 Car. & P. 543.)

[3] "Privilege is not wanted unless the publication is libelous." (Brett, J., Williamson *v.* Freer, L. R. 9 C. P. 395); and per Learned, P. J.: "If the communication is not defamatory there is no need of asserting the privilege." (Moore *v.* Manuf. Bk. 21 N. Y. St. Rep. 654.)

Defendant, the teacher of a high school, undertook, at the request of the school committee, to examine candidates for admission to said school, as to their qualification. Plaintiff was a candidate for admission and submitted to examination. Defendant reported him to the school committee as disqualified. Complaint alleged that the report was made maliciously and was false in fact. A demurrer to the complaint, as not containing a cause of action, was overruled. (Hammond *v.* Hussey, 51 N. H. 40.) The demurrer admitted the falsehood and malice.

existence of malice, *i. e.*, malice in fact, as the true motive of his conduct.[1] It has been said: Few rules of law are of greater practical importance than that which requires proof of express malice, where the words are spoken under circumstances which make the communication privileged. The malice required to deprive communications of this sort of the protection arising out of the occasion of the publication, must be such as to induce the court, or any reasonable person, to draw the inference that the occasion has been taken advantage of to give currency to an unfounded charge.[2] Privileged communications comprehend all statements made *bona fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them,[3] or the interest of the person to whom they are made.[4] A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has *a duty* (§ 239), is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable.[5] But in this definition of a privileged communication, the word *duty* "cannot be confined to legal duties, which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation."[6] But, as was said by Creswell, J.:[7] "It is not easy very precisely to define what

[1] White *v.* Nicholls, 3 How. U. S. Rep. 266; King *v.* Patterson, 49 N. J. L. 417; McLean *v.* Scripps, 52 Mich. 214; Locke *v.* Bradstreet Co. 22 Fed. Rep. 771; Bradley *v.* Heath, 12 Pick. 163.

[2] Manby *v.* Witt, 18 C. B. 544.

[3] Somerville *v.* Hawkins, 10 C. B. 583; 15 Jur. 450; Briggs *v.* Garrett, 111 Pa. St. 404; Halstead *v.* Nelson, 24 Hun, 395. Good motive alone is not an excuse. (Hamilton *v.* Eno, 81 N. Y. 116.)

[4] Pattison *v.* Jones, 8 B. & C. 578. Where there are several distinct [divisible, § 145] charges, some privileged and some not privileged, those not privileged are not justified by the charges that are privileged. (Clarke *v.* Roe, 4 Ir. Com. Law Rep. 1.) One charge may be justified. (§ 212, *post.*)

[5] Marks *v.* Baker, 28 Minn. 162.

[6] Harrison *v.* Bush, 5 El. & Bl. 349. As to duties of imperfect obligation, see § 35, *ante.*

[7] Wenman *v.* Ash, 13 Com. B. 844.

is, and what is not, a privileged communication." We venture, with much hesitation, to suggest the rule as to privilege to be: one may publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication be not *unnecessarily* made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own rights, nor to others than those whom he honestly believes will, by reason of a knowledge of the matter published, be better enabled to assert, or to protect from invasion, either their own rights, or the rights of others intrusted to their guardianship (§ 241). In *Davies* v. *Sneed*,[1] Blackburn, J., says that: "Where a person is so situated that it becomes right, in the interests of society, that he should tell to a third person certain facts, then, if he *bona fide*, and without malice, does tell them, it is a privileged communication." In *Waller* v. *Lock*,[2] Brett, J., says of the above definition: it "is the best; it leaves out all misleading words, saying nothing about duty, and states in plain terms what I conceive to be the true rule."

§ 210. It will be convenient, prior to considering the several occasions which give rise to privileged publications, to discuss the supposed privilege under certain conditions of *repeating* defamatory matter. It already appears that the publication of defamatory matter cannot be justified on the ground that it is but a repetition (§ 114).[3] For a long period, however, it was tacitly con-

[1] Law Rep. 5 Q. B. 611. See, however, Byam *v.* Collins, 111 N. Y. 143.

[2] Law Rep. 7 Q. B. 622.

[3] One who repeats a slander is responsible. (Evans *v.* Smith, 5 T. B. Monr. 363; Kenney *v.* McLoughlin, 5 Gray, 3; Clark *v.* Munsell, 6 Metc. 373; Hampton *v.* Wilson, 4 Dev. 468; Muma *v.* Harmer, 17 Up. Can. Q. B. Rep. 293; *ante*, §§ 114, 202.) It is no defense to an action for defamatory matter published in a newspaper, that it was the communication of a correspondent, or copied from another newspaper (Talbutt *v.* Clark, 3 Moo. & R. 312; Sanford *v.* Bennett, 24 N. Y. 20; Miles *v.* Spencer, 1 Holt R. 533; Parker *v.* McQueen, 8 B. Monr. 16; McDonald *v.*

ceded that such a repetition could be justified by declaring the name of the previous publisher. The supposed origin of the error is a dictum in the Earl of Northampton's case, A. D., 1613.[1] That case was an information under the statutes of *scandalum magnatum* in the Star

Woodruff, 2 Dill. Cir. Ct. R. 244; Regensperger *v.* Kiefer, 6 Cent. Rep. 266; Bruce *v.* Reed, 14 W. N. C. 161; Davis *v.* Shepstone, 11 App. Cas. 187), or that it had been previously published, and the plaintiff had failed to prosecute the previous publisher (Rex *v.* Holt, 5 T. R. 436; Curtiss *v.* Mussey, 6 Gray [Mass.], 261; see Poppenheim *v.* Wilkes, 1 Strobhart, 275); or that when the charge was made, the plaintiff did not deny it. (Fuller *v.* Dean, 31 Ala. 654.) In Reg. *v.* Newman (1 El. & Bl. 268), the defendant on the trial offered to put in evidence the Dublin Review, of a date prior to the alleged libel, in order to show that the charge contained in the libel had been published a considerable time before the alleged libel, and that the publisher had not been prosecuted; this evidence was rejected, and the rejection was made one of the grounds for a motion for a new trial, and per Coleridge, J., "It has been said that probably the libel was true because another libel was published by another person. Upon that principle, it might have been argued that the statements in the Dublin Review were true because they had previously appeared in some other publication. Such evidence is far too vague to be received. The fallacy of the learned counsel's argument consists in the prosecutor's alleged submission to the previous libel. The utmost that can be said is that he did not prosecute the parties. That might have arisen from various considerations. He might not be able to fix on a particular person, or upon any one of character, or he might be prevented from proceeding by his poverty, or by a variety of other circumstances. Besides, it is not always considered expedient to institute proceedings in respect to the first charge" (See Hinman *v.* Hare, 6 Cent. Rep. 44, 53.) Nor is it any justification that prior to the publication complained against, there was a rumor or report current and generally believed that the plaintiff was guilty of the offense imputed. (Hampton *v.* Wilson, 4 Dev. 468; Haskins *v.* Lumsden, 10 Wis. 359; Moberly *v.* Preston, 8 Mo. R. 462; Cade *v.* Redditt, 15 La. An. 492; Dame *v.* Kenney, 5 Foster [N. H.], 318; Lewis *v.* Niles, 1 Root, 346; Knight *v.* Foster, 39 N. H. 576; Woolcott *v.* Hall, 6 Mass. 514; Alderman *v.* French, 1 Pick. 1; Watkin *v.* Hall, Law Rep. 3 Q. B. 396); or that the defendant spoke the words as merely giving the report. (Wheeler *v.* Shields, 2 Scam. 348; Smalley *v.* Anderson, 4 T. B. Monr. 367; Ryer *v.* Fireman's Journal, 11 Daly, 251.) Perhaps a defendant may give in evidence under the general issue the existence of rumors against the plaintiff's character, to show that he has sustained no injury or in mitigation. (Waithman *v.* Weaver, 11 Price, 259 *n*; Treat *v.* Browning, 4 Conn. 408; Nelson *v.* Evans, 1 Dev. 9; Calloway *v.* Middleton, 2 A. K. Marsh. 372; Binns *v.* Stokes, 27 Miss. [5 Cush.] 239.) Neither particular reports, nor public reputation of the slander, nor of kindred charges against the plaintiff, are admissible. (Inman *v.* Foster, 8 Wend. 602; Kennedy *v.* Gifford, 19 Wend. 296; Mapes *v.* Weeks, 4 Wend. 659; Matson *v.* Buck, 5 Cow. 499; see §§ 216, 411.)

[1] 12 Coke, 132; F. Moore, 821. The Statute of Westminster 1 (A. D. 1275) was directed against the devisers of tales occasioning discord between the King (Edward I) and his People or the Great men of the Realm, and the punishment was imprisonment until the accused "brought him into the Court which was the first author of the tale," and see Statute of Gloucester, 2 Rich. II, A. D. 1378, and 12 Rich. II, A. D. 1388.

Chamber, against Goodrich, Cox, Varner, Minor, Lake, and Ingram, for publishing defamatory language concerning the Earl of Northampton. The defendants all appeared in court; Goodrich confessed to the publication, but alleged in justification that he was not the first author, and vouched said Cox, who in like manner confessed and vouched said Varner, who in like manner confessed and vouched said Minor, who in like manner confessed and vouched said Lake, who in like manner confessed and said he heard the words from one Spoket, who said he heard them from said Ingram, who in like manner confessed and said he heard the words from two English fugitives at Leghorn. The court intimated that *the defense of the language being a repetition, would be available in the case of a publication concerning a common person*, but not in the case of a peer, and all the defendants were punished by fine and imprisonment. The error so far gained ground that subsequently [1] we find it held that a plaintiff in an action for slander, where the slander appeared to be a repetition, was required in his declaration to negative that the defendant had in fact heard spoken the language he was charged with publishing. Passing over a long interval we find, A D. 1796, Lord Kenyon, then Chief Justice of the King's Bench, referring approvingly to the Earl of Northampton's case, but he introduced this qualification that to render the repetition justifiable, the defendant must at the time of the repetition, mention the name of the previous publisher, and that to name the previous publisher for the first time in the defendant's plea [2] was not a justification. This qualification was repeated in a subsequent case, A. D. 1805.[3] This other qualification was also introduced, that if the first publisher *retracted* what he had published, one

[1] Crawford *v.* Middleton, 1 Lev. 82.

[2] Davis *v.* Lewis, 7 T. R. 17; and see Church *v.* Bridgman, 6 Mo. 190.

[3] Woolnoth *v.* Meadows, 5 East, 463.

who subsequently and with a knowledge of such retraction repeated the matter, was not legally excused by naming the prior publisher.[1] It long continued to be conceded as law that no action could be maintained for the repetition orally of defamatory matter, if at the time of the repetition the name of the previous publisher was mentioned; thus, in A. D. 1829, in an action for slander, the plea that the language was a repetition of words previously spoken by A., and that A. was named as the author at the time of the publication, was overruled, not because naming the author was no defense, but because the plea did not allege that A. spoke the words maliciously, nor that the defendant believed them to be true, nor that they were spoken on a justifiable occasion.[2] In Connecticut, it seems, that giving the name of the author was never allowed as a defense, but the fact was received in mitigation;[3] subsequently it was held not receivable in that State, even in mitigation.[4] In Pennsylvania, giving the name of the previous publisher was held to rebut the inference of malice,[5] and to amount to a mitigating circumstance.[6] In Maine and some other States, it has been held that in an action for slander, giving the name of the previous publisher of the words is a justification of the repetition.[7] In

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[1] Maitland *v.* Goldney, 2 East, 426.

[2] McPherson *v.* Daniels, 10 B. & C. 263; and see Moberly *v.* Preston, 8 Mo. 462. In Lewis *v.* Walter (4 B. & Ald. 605), it was said there must be a just reason for the repetition. In Hawkes *v.* Coster, 1 Law Reporter, 192 (London, 1821), Abbott, Ch. J., nonsuited the plaintiff in an action for slander, "for the defendant only repeated the words of another, and gave his name at the time." (And see O'Keefe *v.* Earl of Kingston, 1 Leg. Rep. 165 [Irish].)

[3] Leister *v.* Smith, 2 Root, 24.

[4] Austin *v.* Hanchet, 2 Root, 148; Treat *v.* Browning, 4 Conn. 408; and, in Wisconsin, see Sans *v.* Joerris, 14 Wis. 663.

[5] Binns *v.* McCorcle, 2 P. A. Brown's R. 79; Hersh *v.* Ringwalt, 3 Yeates, 508.

[6] Kennedy *v.* Gregory, 1 Binney, 85; Morris *v.* Duane, 1 Binney, 90, *n.* In New Jersy, naming the previous publisher was received in mitigation. (Cook *v.* Barkley, 1 Pennington's N. J. Rep. 169, A. D. 1807.) In Jarnigan *v.* Fleming (43 Mo. 711), it is said that naming the previous publisher is not a defense, *unless it is made with a good* motive. This is equivalent to saying—that naming the previous publisher is not a defense.

[7] Unless it be proven that the rep-

Michigan giving the name of the previous publisher is not a defense.[1] Thus far we have had reference only to actions for slander; the first case in which the question appears to have been raised in an action for libel was in the Supreme Court of Pennsylvania, A. D. 1803.[2] It was there held that giving the name of the author was no excuse for the publication of a libel. The like ruling was made A. D. 1813, in the Supreme Court of New York.[3] The first mention of the point arising in an action for libel in the English courts was in A. D. 1817, when it was held not to be a defense that the defamatory matter was communicated to the defendant by a third person.[4] In a subsequent case, for publishing an alleged libel purporting to be an account of a trial, the plea was that the alleged libel had been previously published in the H. Journal, and that G. H. M. then and still was the publisher thereof; on de-

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etition was malicious. (Haynes *v.* Leland, 29 Maine, 233; Abrams *v.* Smith, 8 Blackf. 95; Jones *v.* Chapman, 5 Blackf. 88; Crane *v.* Douglass, 2 Blackf. 195; Cummerford *v.* McAvoy, 15 Ill. 311; Johnston *v.* Lance, 7 Iredell, 448.) Disclosing name of author at time of repetition held a defense. (Kelly *v.* Dillon, 5 Ind. [Porter], 446; Trabue *v.* Mays, 3 Dana, 138; Robinson *v.* Harvey, 5 T. B. Monr. 519; Parker *v.* McQueen, 8 B. Monr. 16; see Fowler *v.* Chichester, 26 Ohio St. 9; O'Keefe *v.* Earl of Kingston, 1 Leg. Rep. 165.) Giving name of author is evidence of want of malice. (Miller *v.* Kerr, 2 McCord, 285; Church *v.* Bridgman, 6 Mo. 190; and see Easterwood *v.* Quin, 2 Brevard, 64; Smith *v.* Stewart, 5 Barr, 372; Sexton *v.* Todd, Wright [Ohio], 317; Haines *v.* Welling, 7 Ham. 253; Farr *v.* Rasco, 9 Mich. 353; Fowler *v.* Chichester, 4 Amer. Law Record [Ohio], 318.) The defense of giving name of author must be specially pleaded. (Brooks *v.* Bryan, Wright, 760.) In slander, evidence that the defendant had been told by a third person that the plaintiff was guilty of the crime imputed to him is inadmissible. (Mapes *v.* Weeks, 4 Wend. 659; Austin *v.* Hanchet, 2 Root, 148.) In slander, it is no justification that defendant *after* speaking the words and before the commencement of the action, disclosed to plaintiff the author of the words. (Skinner *v.* Grant, 12 Vt. 456; Ropke *v.* Brooklyn Daily Eagle, 9 N. Y. St. Rep. 709.) In Scott *v.* Peebles (2 Sme. & M. 546), it was held to be no defense to an action for slander that the defendant heard the matter from a person out of the jurisdiction of the court. (See Evidence in Mitigation, *post*, § 409, *et seq.*, and Gilman *v.* Lowell, 1 Amer. Lead. Cas. 202, *n.*; 2 Greenl. Ev. § 424, *n.*)

[1] Atkinson *v.* Detroit Free Press Co. 46 Mich. 341.

[2] Runkle *v.* Meyers, 3 Yeates, 518.

[3] Dole *v.* Lyon, 10 Johns. 447. In Tennessee, the plea of repeating the words of another is no defense to a *libel* under any circumstances. (Larkins *v.* Tarter, 3 Sneed, 681.) Otherwise in slander. (*Id.*)

[4] Miles *v.* Spencer, 1 Holt N. P. 533.

murrer the plea was held bad, as the defendant in his repetition had only named the journal from which the alleged libel was copied, and had not given the name of the publisher, and it was intimated by the court that the defense of the publication being a repetition, and that the previous publisher was named at the time of the repetition, did not apply to libel.[1] The first case in which the dictum in the Earl of Northampton's case appears to have been altogether repudiated, was one before Judge Betts, in New York, A. D. 1825.[2] It may now be considered as settled in New York and in England, that neither in the action for slander nor for libel is it any legal excuse that the alleged defamatory matter had been previously published by another, whose name was mentioned at the time of the repetition.[3]

§ 211. It is now almost universally conceded that to show the truth of the matter published is a complete defense to an action either of slander or libel.[4] A publica-

[1] Lewis *v.* Walter, 4 B. & Ald. 605, A. D. 1821.

[2] Chevalier *v.* Brush, Anthon's Law Student, 186; this was followed by Mapes *v.* Weeks, 4 Wend. 659; Inman *v.* Foster, 8 Wend. 602; Hotchkiss *v.* Oliphant, 2 Hill, 510; and see Johnston *v.* Laud, 7 Iredell, 448; Dole *v.* Lyon, 10 Johns. 447; Clarkson *v.* McCarty, 5 Blackf. 574; Moberly *v.* Preston, 8 Mo. 462; Romayne *v.* Duane, 3 Wash. C. C. 246; The State *v.* Butman, 15 La. An. 166.

[3] McGregor *v.* Thwaites, 3 B. & C. 24; 4 D. & R. 695; De Crespigny *v.* Wellesley, 5 Bing. 392; Bennett *v.* Bennett, 6 C. & P. 588; Tidman *v.* Ainslie, 10 Exch. 63; Funk *v.* Beverley, 112 Ind. 190. Nor does it make a defense that the defendant believed the matter published to be true (*Id.*; Sans *v.* Joerris, 14 Wis. 663); or that plaintiff himself had previously published the same matter. (Cook *v.* Ward, 6 Bing. 409; Abshire *v.* Cline, 3 Ind. 115.) As to giving evidence to show that the libel was in fact written by plaintiff himself, see Brookes *v.* Titchborne, 5 Exch. 929.

[4] The phrase, "The greater the truth, the greater the libel," has been usually attributed to Lord Mansfield, also to Lord Ellenborough. Hawkins, in his Pleas of the Crown, Bk 1, ch. xxviii, after saying truth is not a justification, adds: since the greater appearance there is of truth in any such malicious invective, so much the more provoking. Burns wrote:

> Dost not know that old Mansfield,
> Who writes like the Bible,
> Says the more 'tis a truth, sir,
> The more 'tis a libel?

and Moore, "A Case of Libel," odes on Cash, Corn and Catholics, wrote:

> It was nuts for the Father of Lies,
> As that wily fiend is named in the Bible,
> To find it settled by laws so wise,
> The greater the truth, the greater the libel.

See Notes and Queries, 5 S. xii: 170, 259, 279, 299, 358, 478.

tion of the truth is, as to a civil action, absolutely privileged.[1] In the cases of rare occurrence, of actions for

[1] Truth is a good defense in an action for libel or slander. (*Ante*, notes 2, 3, p. 59.) Truth is by statute a defense in Kansas, Louisiana, Maryland, and Virginia (Chaffin *v.* Lynch, 83 Va. 106); also in England. (See Stat. 6 & 7 Vict. ch. 96.) And in Connecticut, Georgia, Indiana, Mississippi, Missouri, New Jersey, North Carolina, Tennessee, Vermont and District of Columbia, truth is a defense to a criminal prosecution. Truth a defense in an action. (Rayne *v.* Taylor, 14 La. Ann. 406; Perry *v.* Man, 1 Rhode Island, 263; Joannes *v.* Jennings, 6 Sup. Ct. R. [T. & C.] 138; 4 Hun, 66; Root *v.* King, 7 Cow. 613, and 4 Wend. 113; 1 Stark. on Sland. 229; Lake *v.* Hutton, Hob. 253; l'Anson *v.* Stuart, 1 T. R. 748; Press Co. *v.* Stewart, 119 Penn. St. 584; Thompson *v.* Press Co. 37 Minn. 285; Edwards *v.* Times Co. 32 Fed. Rep. 813; Heilman *v.* Shanklin, 60 Ind. 424; Castle *v.* Houston, 19 Kans. 417.) The Constitution of Florida provides that truth shall not be a defense in either a criminal prosecution or a civil action for libel, unless the publication was prompted by good motives. (Wilson *v.* Marks, 18 Fla. 322.) But the defense of truth must be pleaded, and cannot be given in evidence under the general issue, either in bar or in mitigation. (Underwood *v.* Parks, 2 Str. 1200; Manning *v.* Clement, 7 Bing. 367; 2 Greenl. Ev. § 424; Andrews *v.* Vanduzer, 11 Johns. 38; Van Ankin *v.* Westfall, 14 Johns. 233; Shepard *v.* Merrill, 13 Johns. 475; Snyder *v.* Andrews, 6 Barb. 43; Wagner *v.* Holbrunner, 7 Gill, 296; Smith *v.* Smith, 8 Ired. 29; Kelley *v.* Dillon, 5 Porter [Ind.], 426; Arrington *v.* Jones, 9 Port. 139; Douge *v.* Pearce, 13 Ala. N. S. 127; Kay *v.* Fredrigal, 3 Barr, 221; Thompson *v.* Bowers, 1 Doug. 321; Taylor *v.* Robinson, 29 Maine [16 Shep.], 323; Teagle *v* Deboy, 8 Blackf. 134; Waggstaff *v.* Ashton, 1 Harring. 503; Bodwell *v.* Swan, 3 Pick. 376; Alderman *v.* French, 1 Pick. 1; Updegrove *v.* Zimmerman, 13 Penn. 619; Scott *v.* McKinnish, 15 Ala. 662; Eagan *v.* Gantt, 1 McMullan, 468; Rumsey *v.* Webb, 1 Car. & M. 104; Else *v.* Ferris, Anthon N. P. 36; Barns *v.* Webb, 1 Tyler, 17; Samuel *v.* Bond, Litt. Sel. Cas. 158; Treat *v.* Browning, 4 Conn. 408; Bisbey *v.* Shaw, 12 N. Y. 67; Sheahan *v.* Collins, 20 Ill. 325; Haws *v.* Stanford, 4 Sneed, 520; and see Sidgreaves *v.* Myatt, 22 Ala. 617.) The defendant may prove in mitigation such facts as show a ground of suspicion not amounting to actual proof of the charge (Wagner *v.* Holbrunner, 7 Gill, 296), or which tends to a proof of the truth, yet fall short of it (Snyder *v.* Andrews, 6 Barb. 43; Bisbey *v.* Shaw, 12 N. Y. 67; Code of Civ. Pro. N. Y. §§ 535, 536; Scott *v.* McKinnish, 15 Ala. 662), or which rebut the presumption of malice. (Kennedy *v.* Dear, 6 Porter, 90; Arrington *v.* Jones, 9 Porter, 139; Hart *v.* Reed, 1 B. Mon. 166; Chapman *v.* Calder, 14 Penn. [2 Harris], 365; Abshire *v.* Cline, 3 Ind. 115; and see Moseley *v.* Moss. 6 Gratt. 534.) Evidence of general bad character may be admitted under the general issue. (Smith *v.* Smith, 8 Ired. 29; Taylor *v.* Robinson, 29 Maine, 323.) An action of slander for charging a man with having the venereal disease, and with that disease upon him contracting marriage, and communicating that disease to his wife, cannot be maintained, if the plaintiff immediately after his marriage had the disease in fact, even by proof that his wife, whom he married without knowing that she had the disease, communicated it to him. (Golderman *v.* Stearns, 73 Mass. 181.) Where the charge is of a crime of which the plaintiff was convicted, it is no answer to a plea of the truth of the charge that the plaintiff was pardoned. (Baum *v.* Clause, 5 Hill, 196; see *ante*, § 158.)

The provision of the Constitution of the State of New York, prior to its amendment in 1846, as to the defense of truth in prosecutions for libel, does not apply to civil actions. (Dolloway *v.* Turrell, 26 Wend. 383.) The

writing defamatory words upon documents of the plaintiff, whereby the document is rendered less valuable or entirely valueless to the owner, the truth of the defamatory matter is not a defense. These are not exceptions to the rule that truth is a defense in an action for slander or libel. Such actions are, in fact, not actions for libel, but actions for malicious injury to property. Where a coach proprietor wrote upon the license of his driver, "Discharged for being one shilling short," or where a police commissioner wrote on "a certificate" of a police officer, "Dismissed the police force," pleas of the truth of these statements were overruled.[1] We do not pretend to vindicate, either as just in its practical operation or as sound in principle, the rule which makes truth a complete defense to an action for slander or libel. The justice and expedience of this rule is neither universally, nor even generally, conceded.[2] The

amendment of 1846 limits the provision to *criminal* proceedings. (And see Joannes *v.* Jennings, 6 Sup. Ct. Rep. [T. & C.] 138; see further under heads Pleading, Evidence.)

It is said that where a crime is charged, and the defense of truth is sustained, the plaintiff may be put upon his trial for the offense without the intervention of a grand jury. (Cook *v.* Field, 3 Esp. R. 133.) Many instances have occurred where the plaintiff's action for slander imputing the commission of a crime, have occasioned the prosecution and conviction of the plaintiff for the imputed offense. (See Pigot *v.* Pigot, Cro. Car. 531; and note *t*, 1 Stark. Sland. 237; Symons *v.* Blake, 2 C. M. & R. 416; 4 Dowl. P. C. 263; 1 Gale, 182.) And see Odger on Libel, Am. ed. by Bigelow, 177, note *c*.

Wm. Parks, the first printer in Williamsburg, Virginia, published (A. D. 1736) of a member of the House of Assembly, that he had been convicted of sheep stealing; Parks being arraigned before the House, stated the charge to be true, and that being found the fact, he was discharged. (See Thomas' History of Printing in America.)

[1] Rogers *v.* Macnamara, 14 Com. B. 27; Hurrell *v.* Ellis, 2 Com. B. 295; Taylor *v.* Rowan, 7 Car. & P. 70; Wenhak *v.* Morgan, 20 Q. B. D. 635. In such an action substantial damages may be given. (*Id.*) Where a shipping act authorizes a shipmaster, in filling up a report to the shipping officer upon the discharge of a seaman, to decline to give any character under the headings of "conduct," "capacity" and "sobriety," yet if he write "declined" in these columns, it will be competent for a jury, on sufficient evidence, in an action by the seaman, to say that such word had a libelous meaning. (Garsen *v.* Jacobsen, 5 Vict. Law Rep. L. 7; § 239, *post*.)

No inference of malice or of libelous meaning is to be drawn from the filling up by a shipmaster of a seaman's certificate of discharge, in the columns as to ability, sobriety and conduct, by a cross. (Snewin *v.* Doherty, 6 Vict. Law Rep. L. 305.)

[2] "I am quite clear that the truth ought not to be made decisive (as a defense), either in civil or criminal proceedings; for cases may be put where the truth, instead of being a justification, would not even be any

maxim that a man shall not profit by his own wrong,[1] ordinarily adduced as an apology for the rule under consideration, if it applies in any case, certainly has no application where the truth consists in the misfortune and not in the wrong-doing of the person whom the publication concerns. The rule allowing truth as a defense in a civil action for slander or libel appears to be an innovation, and of comparatively modern introduction.[2] Probably

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mitigation; nay, where it would be an aggravation." (Lord Brougham, Evidence, Rep. of House of Lords on Libel, &c., July, 1843); and see in the same report the opinions of other lawyers and judges to the like effect; and see 2 Kent's Com. 25; Borthwick on Libel, 252; 29 Parl. Hist. 575; Preliminary Discourse to Starkie on Slander, xliv.

[1] Blackstone gives as a reason the merit of the defendant in having exposed the truth. (3 Black. Com. ch. viii.) This is combated by Starkie, who contends for the ground that the plaintiff cannot take advantage of his own wrong. (1 Starkie on Slander, 230, 232; and see Preliminary Discourse to Starkie on Slander.)

If the words be true they are no slander, and may be justified. (2 Wils. 301; 11 Mod. 99.) If the defendant . . . prove the words to be true, no action will lie, . . . for then it is no slander or *false tale*. (3 Black. Com. ch. viii.) The defendant is justified in law and exempt from all civil responsibility if that which he publishes be true. (1 Starkie on Slander, 229.) "The truth is no slander." (Shakespeare, Romeo and Juliet.)

In Rex *v.* Roberts (Ms. 8 Geo. II, A. D. 1735), Lord Hardwicke, Ch. J., remarks: "It is said that, if an action was brought, the fact, if true, might be justified; but I think that is a mistake. Such a thing was never thought of in the case of Harman *v.* Delany (2 Stra. 898). I never heard such a justification, in an action for libel, even hinted at; the law is too careful in discountenancing such practices; all the favor that I know truth affords in such a case is, that it may be shown in mitigation of damages." It is added in a note by the editor of the American edition of Starkie on Slander (vol. I, p. 233): "In the time of Lord Hardwicke it was denied, not only by him but by others, that the truth could be given in evidence in bar of a recovery;" and in a subsequent note (vol. I, p. 235), until 1792, when the judges of England gave their opinion in Parliament upon questions put to them on the libel bill, the only authorities for the position that a defendant might plead the truth of a libel in justification, were the dicta of Hobart, Ch. J., in Lake *v.* Hutton (Hob. R. 253), and of Holt, Ch. J., in Beaver *v.* Hides (2 Wils. 301), Anon. (11 Mod. 99), and the acquiescence of the bar and the court in I'Anson *v.* Stuart (1 T. R. 748). Since then are the cases of King *v.* Parsons (A. D. 1799), in which Lord Kenyon observed that it was competent for a defendant in an action for libel to plead the truth in justification; and Plunket *v.* Cobbett (A. D. 1804), in which Lord Ellenborough remarked, "in case the libel had been true, the defendant could have justified it on the record." Another reason assigned for making truth a defense is that truth disentitles to damages. (Blackburn, J., Campbell *v.* Spottiswoode, 8 Law Times Rep. N. S. 201; 3 Best & S. 769; Fairman *v.* Ives, 5 B. & Ald. 646.)

[2] Selwyn's N. P. 986; Borthwick on Libel, 246. Truth, it is said, was at all times a defense in an action for *slander*. (1 Stark. on Slander, 234; 3

its origin was in this wise: Until the statute of the fourth year of Queen Anne, A. D., 1706, only a single plea was permitted in a civil action, and there is no record prior to that statute of a plea of truth in an action for slander or libel. At least until A. D. 1702, truth was admitted in mitigation under the general issue of not guilty,[1] but between that date and A. D. 1716, probably after the statute of Anne allowing several pleas, at a meeting of the judges of England, the rule was settled not to allow the truth to be given in evidence in mitigation, but requiring "that it should be pleaded."[2] From this we infer that no such plea existed prior to that time, and the requiring the truth to be specially pleaded was evidently to prevent a surprise upon the plaintiff, and to enable him to be prepared with his reply. Notwithstanding this rule requiring truth to be specially pleaded, we find that at least until A. D. 1735, truth was regarded only as a matter of mitigation. The system of pleading then in vogue knew no such thing as a plea in mitigation; in that system every plea was either in abatement or in bar, and when truth was required to be pleaded it was almost of course to regard it as a plea in bar, and thus, as we suppose, the truth, when specially pleaded, became a defense. The truth, however, which is admitted as a defense is the truth of the defamatory matter in substance and in fact, and in the sense in which it was used and was intended to be understood. If A. says of X. that he is a thief, and C. publishes that A. said X. was a thief, in a certain sense C. would publish the truth, but not in the sense

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Black. Com. ch. viii.) This, however, seems doubtful. See Smith *v.* Richardson (Willes, 20; Bull. N. P. 7), where it is said: "When evidence of the truth of the words was offered in *mitigation* of damages, Lord Macclesfield, with a great deal of indignation, refused to admit it." "In an action for libel it was no defense that the matter complained of was true, unless the defendant could show that the public was interested in the exposure." (Dig. xlviii, 19, 24; Spence, Origin of Laws, &c. 151.)

[1] Underwood *v.* Parks, 2 Strange, 1200.

[2] Smithies *v.* Harrison, 1 Ld. Raym. 727.

which would constitute a defense; C's publication would in fact be but a repetition of A's words, which, as we have seen, would not be a defense (§ 210). The truth, which in such a case would amount to a defense, would be that X. was a thief.[1] Again, if A., speaking ironically, says of X. that he is an honest man, meaning and conveying the idea that X. is a dishonest man, it would not be a justification of these words to allege that it was true X. was an honest man, but to constitute a defense the allegation required would be that it was true X. was a dishonest man. We shall give, in the following sections, some illustrations of the requirements of a justification on the ground of truth, and the subject will be further illustrated under the head of Pleading (§ 355).

§ 212. Where defamatory allegations, whether published orally or in writing, are divisible (§ 145), but not otherwise, the defendant is permitted to justify on the ground of truth, one or some of them, less than the whole.[2] But whether he justify the whole or part only, the justification, as to so much as is intended to be justified, must go the whole length of the charge in all its material allegations and specifically point out the acts of which plaintiff was alleged to be guilty.[3] The justification must always be as broad as the charge, and of the very charge attempted to be justified.[4] A charge that the

[1] Watkin *v.* Hall, Law Rep. 3 Q. B. 396.

[2] See *ante*, notes to § 145. and note 4, p. 300, *ante;* and Stiles *v.* Nokes, 7 East, 493; Andrews *v.* Thornton, 8 Bing. 431; 1 M. & Sc. 670; Gregory *v.* Duke of Brunswick, 6 Sc. N. R. 809; Vessey *v.* Pike, 3 C. & P. 512; Van Derveer *v.* Sutphin, 5 Ohio St. 293; O'Connell *v.* Mansfield, 9 Ir. Law Rep. 179; Smith *v.* Parker, 13 M. & W. 459; Fero *v.* Ruscoe, 4 N. Y. 162. A declaration for a libel commencing "horse-stealer," and followed by a statement of facts, and concluding that the defendant published it with intent to cause it to be believed that the plaintiff had been guilty of feloniously stealing a horse; plea, except as to the word horse-stealer, a justification, stating circumstances inducing suspicion that the plaintiff had been guilty of the fact; held, on demurrer, that the plea was insufficient. (Mountney *v.* Watton, 2 B. & Ad. 673.) Defendant's belief that his horse was stolen would be admissible in mitigation of damages. (Morris *v.* Lachman. 68 Cal. 109.)

[3] Mull *v.* McKnight, 67 Ind. 535.

[4] Weaver *v.* Lloyd, 2 B. & C. 678; 4 D. & R. 230; Bissell *v.* Cornell, 24

plaintiff, a brewer, *caused* his establishment to be supplied with unwholesome water, is not proved to be true by showing that the establishment *was* supplied with unwholesome water. To establish the truth of the charge, it must be shown the plaintiff *caused* the supply.[1] To a charge against the plaintiff, a schoolmaster, that the decay of the school under his management was attributable to his violent conduct, it was held, on special demurrer to the plea, not a sufficient justification to allege that the plaintiff had been guilty of violent conduct toward some of his scholars; to have amounted to a justification, it should have been shown that the decay of the school was occasioned by the violent conduct of the plaintiff.[2] The alleged libel was in

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Wend. 354; Stilwell *v.* Barter, 19 Wend. 487; Fidler *v.* Delavan, 20 Wend. 57; Curtis *v.* Perkins, 66 Barb. 610; Tull *v.* David, 27 Ind. 377; Thompson *v.* Pioneer Press Co. 37 Minn. 285; Torrey *v.* Field, 10 Vt. 353; Crump *v.* Adney, 1 Cr. & M. 362; Burford *v.* Wible, 32 Penn. St. Rep. 95; Wilson *v.* Beighler, 4 Iowa, 427; Van Derveer *v.* Sutphin, 5 Ohio, N. S. 293; Morrow *v.* McGaver, 1 Ir. C. L. R. 579; Powers *ads.* Skinner, 1 Wend. 451; Cooper *v.* Barber, 24 Wend. 105; McKinly *v.* Rob, 20 Johns. 351; Kerr *v.* Force, 3 Cranch C. C. 8; Bennett *v.* Matthews, 64 Barb. 410. The plea must justify the same words as those contained in the declaration. (Skinner *v.* Grant, 12 Vt. 466; Gregory *v.* Atkins, 42 Vt. 237; Ormsby *v.* Douglass, 2 Abb. Prac. Rep. 407; 37 N. Y. 377.) "In pleading justification you should use the very words alleged to have been uttered." (Restell *v.* Steward, 1 Charley's Cases at Chambers, 89.) "There is no such thing as a half-way justification. When several distinct things are charged (§ 145 *ante*), the defendant may justify as to one, though he may not be able to do so as to all; but as to any one charge, the justification will either be everything or nothing. If the charge be of stealing a horse, it is not half a defense, nor any part of one, to show the plaintiff took the horse by a mere trespass." (Fero *v.* Ruscoe, 4 N. Y. 165; and see Reg. *v.* Newman, 1 El. & B. 268 and §§ 355, 409, *post*.)

[1] Fidler *v.* Delavan, 20 Wend. 57. A charge that plaintiff was a "*cheat*" and "swindler," was held justified by the fact that he sold goods for the purpose of preventing their seizure under an attachment for the benefit of his creditors. (Odiorne *v.* Bacon, 6 Cush. 185.) Saying of a merchant that his credit is bad is not justified by a plea that plaintiff would not pay his debts. (Kirwan *v.* Dennan, 2 Hud. & Br. 628.)

[2] Smith *v.* Parker, 13 M. & W. 459. To a declaration for a libel, charging that, by hypocritical cant, &c., plaintiff and his associates effected the incorporation of the Manhattan Bank, in which plaintiff's share of the profits were several thousand dollars; and that plaintiff, as a member of the Senate, advocated the bill entitled "An Act for supplying the city of New York with pure and wholesome water," knowing that it contained a clause authorizing the company to carry on banking business, and when he knew that other members of the legislature were ignorant of that fact, &c., the defendant pleaded in justifica-

substance, that plaintiffs, an insurance company, had lost heavily on debentures; that their history was one of outrageous extravagance and dangerous debility; that for years they had trembled on the verge of disaster, and that they were in an unsound and precarious condition. Plea, that plaintiffs had for several years made untruthful annual statements; had lost large sums of money by investments, and had paid larger dividends than the financial condition would justify. The plea, on demurrer, held bad.[1] A

tion that the plaintiff was a senator on second of April, 1798; that such a law was passed, and that, at the time of passing said law (first of April, 1798) plaintiff, as senator, advocated the bill, knowing at the time that it contained such clause, &c.; and that a large majority of the members of the legislature were ignorant of that fact, &c.; and that, at the time and place first above mentioned, plaintiff held, and was owner of a large portion of the stock created by the said law, to wit, five thousand dollars; all which acts of the plaintiff were hypocritical and deceptive, and contrary to his duty as a senator, &c. The plaintiff replied, that at the time he advocated the said law as a senator, he did not hold, and was not owner of any stock created by it; nor had he any interest whatever in the stock, &c. On a general demurrer to the reply the plea was held to be bad, as not being an answer to the declaration, and that the defendant having committed the first fault in pleading, the plaintiff was entitled to judgment. (Spencer *v.* Southwick, 11 Johns. 573; rev'g 10 Johns. 259; where the replication was held to be bad.) Held that a charge of incest could not be justified by alleging that plaintiff told the defendant her brother had had sexual intercourse with her. (Abshire *v.* Cline, 3 Ind. 115; and see Long *v.* Brougher, 5 Watts, 439, and in note 3, p. 306, *ante*.) It is not every act of illicit intercourse on the part of a female that will justify calling her a whore. (Smith *v.* Wyman, 4 Shep. 13: see Sheehey *v.* Cokley, 43 Iowa, 183; *contra*, Alcorn *v.* Hooker, 7 Blackf. 58.) The defendant, in a case of slander, admitted in his answer that, while he was conducting his own cause before a justice, and examining the plaintiff as a witness, he interrogated him: "Do you say I put you on Williams' land?" that the witness answered, "I do," and that the defendant replied, "That's a lie." The answer further alleged that plaintiff's answer to defendant's question, and his statement that the defendant put witness on Williams' land, were untrue. Held, that the answer was not good as a justification of a charge of perjury. (Lewis *v.* Black, 27 Miss. 425.) Justification of charge of perjury, see Mull *v.* McKnight, 67 Ind. 535. A charge that plaintiff's ship was unseaworthy and had been bought by Jews to take out convicts, is not justified by showing the ship was unseaworthy. (Ingram *v.* Lawson, 5 Bing. N. C. 66.) The justification should be of the *meaning*, not of the words merely. (Snow *v.* Witcher, 9 Ired. 346; Fidler *v.* Delavan, 20 Wend. 57.) The charge must be directly met, and not argumentatively or by inference. (*Id.*) Where the charge was that the plaintiff had *bolted*, it is not a justification to say he *quitted*. (O'Brien *v.* Bryant, 16 M. & W. 168; 4 D. & L. 341; 16 Law Jour. Rep. 77, Ex.: and see Watcher *v.* Quenzer, 29 N. Y. 547; Blakeman *v.* Blakeman, 31 Minn. 396; Ede *v.* Scott, 7 Ir. Com. Law R. 607; Watkin *v.* Hall, L. R. 3 Q. B. 396. See note to § 357 *post*.)

[1] Canada Life Assur. Co. *v.* O'Loane, 32 Up. Can. Q. B. 379.

charge that the plaintiff had stolen defendant's shingles is not justified by the fact that plaintiff sold defendant's shingles without his authority, and afterward denied that he knew anything respecting them; to constitute a justification of such a charge, a felonious taking must be shown.[1] And where the charge was that plaintiff had begotten a bastard child, innuendo that he had committed adultery with the child's mother, it was held that to allege an adulterous intercourse with the mother of the bastard was not stating a sufficient justification.[2] So a charge of selling intoxicating liquor contrary to law, is not justified by showing a sale of intoxicating liquor. The charge that the sale was contrary to law is not answered.[3] A charge of criminal intercourse with A. cannot be justified by showing a criminal intercourse with B.[4] A charge of incest and pregnancy is not justified by proof of incest only.[5] A charge that "he is a lying, slanderous rascal," is not justified by showing that plaintiff had stated what was untrue, unless it be also shown that he did it maliciously.[6] To justify a charge that plaintiff will steal anything he can get hold of: "He is in the habit of picking up things.

[1] Shepard *v.* Merrill, 13 Johns. 475.

[2] Holton *v.* Muzzy, 30 Vt. 365.

[3] Holton *v.* Muzzy, 30 Vt. 365. Where the alleged libel was, "I will not meet Dr. B. in consultation, he is not a properly qualified man. I will have nothing to do with him; he bought up his votes for the hospital; he is an advertising doctor, and it is generally believed his diploma is not good. . . No regular practitioner will have anything to do with such a man." Plea that plaintiff was an advertising man and an advertising doctor, was, on demurrer, held bad. (Beaney *v.* Fitzgerald, 2 Wyatt & Webb Law, 104.)

[4] Watters *v.* Smoot, 11 Ired. 315; and see Pallet *v.* Sargent, 36 N. H. 496; Randall *v.* Holsenbake, 3 Hill (So. Car.), 175; Ridley *v.* Perry, 4 Shepl. 21; Hallowell *v.* Guntle, 82 Ind. 554. In case for words importing adultery with Jane at stile, defendant may give in evidence in mitigation of damages, that plaintiff committed adultery with Jane at stile, but not evidence of adultery with any other. (Smithies *v.* Harrison, 1 Ld. Raym. 727.) *Semble*, a defendant cannot justify a charge that the plaintiff had criminal intercourse with a woman at a certain place, by pleading that he had such intercourse with her at another place. (Sharpe *v.* Stephenson, 12 Ired. 348.)

[5] Edwards *v.* Kansas City Times, 32 Fed. Rep. 813.

[6] Snowden *v.* Lindo, 1 Cr. C. C. 569.

He stole wool of L.," various acts of theft must be shown.[1] So a charge of committing one offense is not justified by showing the commission of another offense, although of the same, or even greater enormity.[2] A charge of stealing one kind of chattel cannot be justified by showing theft of another kind of chattel. A charge that plaintiff stole "a pot and waiter" is not justified by the fact that he stole a waistcoat pattern.[3] A charge of stealing a dollar from A. cannot be justified by proof of stealing a dollar from B.[4] To prove a forgery to the amount of $80 is not a justification of a charge of forgery to the amount of $250, or any other sum.[5] A charge of the crime against nature with a *mare*, is not justified by showing a commission of that crime with a *cow*.[6] A charge that A., a commissioner to examine witnesses, returned the examination of *divers* witnesses that were never sworn, is not justified by proof of a return of the examination of *one* witness who had not been sworn.[7] Nor is a charge that the plaintiff carried on smuggling as

[1] Talmadge *v.* Baker, 22 Wis. 624.

[2] Stow *v.* Converse, 4 Conn. 17; Torrey *v.* Field, 10 Vt. 353; Andrews *v.* Van Duzer, 11 Johns. 38; Frederitze *v.* Odenwalder, 2 Yeates, 243; Ridley *v.* Perry, 4 Shep. 21. Charging plaintiff with being a whore is not justified by the fact that she is a "reputed thief." (Smith *v.* Buckecker, 4 Rawle, 295), or that she has a bad reputation for chastity (Sunman *v.* Brewin, 52 Ind. 140). It is no justification of a charge of horse stealing and counterfeiting that plaintiff was thought no more of than a horse thief. (Nelson *v.* Musgrave, 10 Mo. 648.) A charge of *horse* stealing is not justified by proof of *hog* stealing. (Dillard *v.* Collins, 25 Gratt. [Va.] 343.) A charge of hardness toward the poor, dissoluteness of morals, &c., purporting to be conclusions from instances of bad conduct previously narrated in the publication, cannot be justified by proof of other instances. (Barthelemy *v.* The People, 2 Hill, 248.) Proof that plaintiff swindled will not justify a charge of larceny or robbery. (State *v.* Verry, 36 Kans. 416.)

[3] Eastland *v.* Caldwell, 2 Bibb. 21; Hilsden *v.* Mercer, Cro. Jac. 676. A charge of perjury on one occasion cannot be justified by showing that plaintiff committed perjury on some other occasion, or in some other respect than that alleged. (Whitaker *v.* Carter, 4 Ired. 461; Starr *v.* Harrington, 1 Smith [Ind.], 360; 1 Cart. 515; Randall *v.* Holsenbake, 3 Hill [So. Car.], 175; Sanford *v.* Gaddis, 13 Ill. 329.)

[4] Self *v.* Gardner, 15 Mo. 480.

[5] Stiles *v.* Comstock, 9 How. Pr. R. 48.

[6] Andrews *v.* Van Duzer, 11 Johns. 38; Downs *v.* Hawley, 112 Mass. 237; Shigley *v.* Snyder, 45 Ind. 541.

[7] Fysh *v.* Thorowgood, Cro. Eliz. 623.

a business justified by proof of a single act of smuggling.[1] So a charge of smuggling *during* the war is not justified by showing a smuggling *before* the war.[2] And where the charge was that plaintiff was a bankrupt in April, in the twelfth year of James the First, it was held not to be a justification to show that plaintiff was a bankrupt in the fifteenth year of James the First.[3] It is not a justification of several charges to prove the truth of one of them.[4] A charge in these words: "Thou hast played the thief with me, and hast stolen my cloth and a half yard of velvet," is not justified by showing that plaintiff was defendant's tailor, and that he, defendant, delivered to plaintiff a yard and a half of velvet to make defendant hose, and plaintiff made them too narrow, by reason of which defendant said, "Thou hast stolen part of the velvet which I delivered to you."[5] A charge against an attorney, "You are a paltry lawyer, and used to play on both hands," is not justified by showing that plaintiff had exhibited articles of the peace against R., and had afterwards promised R. that he should not be molested on account of those articles, and that notwithstanding he had endeavored to prosecute R. upon those articles.[6] A charge that plaintiff, an attorney, had been struck off the rolls is not justified by showing that he was suspended for two years.[7] A charge that plaintiff, a public minister, had traitorously betrayed the secrets of his own government, is not justified by the fact that the plaintiff disclosed the instructions given to him as such minister, although coupled with the additional fact that he was censured by his government for making

[1] Stillwell *v.* Barter, 19 Wend. 487.

[2] Stillwell *v.* Barter, 19 Wend. 487.

[3] Upsheer *v.* Betts, Cro. Jac. 578. But where the charge is not limited as to *time*, neither should the justification be so limited. (Stowell *v.* Beagle, 57 Ill. 97.)

[4] Powers *ads.* Skinner, 1 Wend. 451; People *v.* Ev. News Asso. 51 Mich. 11.

[5] Johns *v.* Gittings, Cro. Eliz. 239; and see Billingham *v.* Mynors, Cro. Eliz. 153.

[6] Rich *v.* Holt, Cro. Jac. 267.

[7] Blake *v.* Stevens, 4 Fost. & F. 232.

such disclosures.[1] A charge that plaintiff, a counsellor at law, had offered himself as witness in order to divulge the secrets of his client, is not justified by the fact that in a private conversation out of court the plaintiff disclosed a secret of his client, nor by the fact that plaintiff offered himself as a witness to divulge matters communicated to him by his client, but which were not privileged publications in the sense of publications he was privileged from disclosing (§ 208).[2] A charge that plaintiff, a clergyman, had asserted that the blood of Christ had nothing to do with our salvation, more than the blood of a hog, is not justified by the fact that plaintiff had denied the divinity of Christ and the doctrine of the atonement; and asserted that Christ was a creature, a perfect man, but there was no more virtue in his blood than that of any creature.[3] So a charge, "But this is not the first time the idea of falsehood and M. B. [plaintiff] have been associated together in the minds of many honest men," is not justified by the fact that more than seven persons believed plaintiff not to be a man of truth, but addicted to falsehood.[4] Charging the plaintiff, a proctor, with having been suspended *three* times, is not justified by the fact that he had been *once* suspended.[5] Where the charge is of a crime committed under aggravating circumstances, the aggravating circumstances must be justified; it is not sufficient to justify as to the commission of the crime. Thus where the alleged

[1] Genet *v.* Mitchell, 7 Johns. 120.

[2] Riggs *v.* Denniston, 3 Johns. Cas. 198.

[3] Skinner *v.* Grant, 12 Vt. 456.

[4] Brooks *v.* Bemiss, 8 Johns. 356.

[5] Clarkson *v.* Lawson, 6 Bing. 266, 587; 4 M. & P. 356, 605; Biddulph *v.* Chamberlayne, 17 Q. B. 351; Skinner *ads.* Powers, 1 Wend. 451. The charge was that plaintiff, ex-mayor of R., had in two mayoralties bought coal at six pence a bushel, and charged them at four pence to the poor and four pence to the corporation, pocketing two pence per bushel. Plea that plaintiff did so in his first mayoralty, and that in his second mayoralty he charged *three* pence to the corporation and *three* pence to the poor. Plea held bad, the charge being of a double charge of *four* pence in each mayoralty. *Held*, also, that the plea conferred a cause of action, and repleader refused. (Goodburne *v.* Bowman, 9 Bing. 532; 2 M. & Sc. 700.)

libel charged that the plaintiff had been tried for murder in a duel, and that "he had spent nearly the whole of the night preceding the duel in practicing pistol firing," held that to constitute a justification it must be shown not only that the plaintiff had been tried for murder, but that he spent nearly the whole of the night preceding the duel in practicing pistol firing.[1] The charge against the plaintiff was *inter alia*, "he has robbed me *to a serious amount*." The pleas were the general issue, and as to the words "he has robbed me," the plaintiff had robbed defendant of a loaf of bread of the value of three pence. On the trial the plaintiff proved the charge, and the defendant proved the stealing by plaintiff of the loaf of bread. The judge directed the jury to give some damages for the words *to a serious amount*, which were not covered by the plea. The jury gave the plaintiff forty shillings damages, and the court above refused to disturb the verdict.[2] The charge that plaintiff had been imprisoned on a *charge* of high treason, is not justified by the fact that plaintiff was arrested on suspicion of high treason.[3] And a charge that the plaintiff, a commissioner in bankruptcy, had been guilty of *willful* misconduct in his office, is not justified by showing misconduct consistent with rectitude of intention.[4] Where the publication was in "the black list,"

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[1] Helsham *v.* Blackwood, 11 C. B. 111; 20 Law Jour. Rep. N. S. 187, C. P.; and see Churchill *v.* Hunt, 2 B. & Ald. 685. In that case the declaration stated the accidental collision of a carriage driven by plaintiff with another carriage, and the death, by such collision, of a person riding in the other carriage, and that plaintiff was free from fault in the transaction, and then set forth the alleged libel which attributed the catastrophe to the misconduct of plaintiff and his furious driving, and that he had gone to a public ball on the evening of the event, and disparagingly compared the conduct of plaintiff with that of one of his ancestors. The defendant pleaded, in justification, that plaintiff occasioned the accident by his misconduct, but did not justify the charge of going to a public ball, &c. The justification was proved so far as it went on the trial, but the plaintiff recovered damages as to the part not justified.

[2] 1 Starkie on Slander, 484. Where two charges are made, incest and pregnancy, plaintiff is entitled to nominal damages if defendant fail to prove pregnancy. (Edwards *v.* Kansas City Times, 32 Fed. Rep. 813.)

[3] Cooke on Defam. 116.

[4] Riggs *v.* Denniston, 3 Johns. Cas. 198. Meaning of Willful. (State

with ruled columns showing entry of judgments, held not to be justified merely by showing such a judgment once existed. The language and mode of publication imputed the *continuance* of a judgment.[1] A general charge cannot be justified by a single instance; thus a charge of being a "libelous journalist" is not justified by proof of plaintiff's conviction for libel on one occasion;[2] a charge against a practicing lawyer of being a pettifogger and without character, not justified by showing a single instance of misconduct;[3] a charge of stealing hogs not justified by showing the stealing of one hog;[4] a charge of being a whore not justified by showing that plaintiff, before marriage, had carnal connection with her intended husband;[5] a charge that plaintiff had, one night, gone nine miles from home, to four different colliers' shanties, and had gone to bed to the colliers, is not justified by showing that plaintiff had criminal intercourse with one collier, at a different place from that referred to.[6]

§ 213. A justification on the ground of truth need not go further than the charge,[7] and it is sufficient to justify so much of the defamatory matter as is actionable,[8] or so

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v. Massey, 97 No. Car. 465; State *v.* Morgan, 98 *Id.* 641; State *v.* Wittner, 98 *Id.* 590; Felton *v.* U. S., 96 U. S. 699; State *v.* Vanderford, 35 Fed. Rep. 287.)

[1] McNally *v.* Oldham, 16 Ir. Com. Law R. 298; 8 Law Times, N. S. 604. See note to § 229, *post*.

[2] Wakley *v.* Cooke, 4 Exch. 511.

[3] Fitch *v.* Lemmon, 27 Up. Can. Q. B. Rep. 273.

[4] Swann *v.* Rary, 3 Blackf. 298.

[5] Sheehey *v.* Cokley, 43 Iowa, 183; *note to* § 172, *ante*; Smith *v.* Wyman, 4 Shep. 13; Murray *v.* Murray, 1 Cinn. (Ohio), 290; *contra*, Alcorn *v.* Hooper, 7 Blackf. 58.

[6] Burford *v.* Wible, 32 Penn. St. R. 95, and see Ricket *v.* Stanley, 6 Blackf. 169.

[7] Sanford *v.* Gaddis, 13 Ill. 329; Holmes *v.* Jones, 20 N. Y. St. Rep. 176.

[8] Clarke *v.* Taylor, 2 Bing. N. C. 654; and see Wilson *v.* Nations, 5 Yerg. 211. Defendant published of plaintiff, the proprietor of a newspaper, that plaintiff had for the past twelve months made his paper a receptacle for coarse abuse, scurrilous personalities, and in some cases gross slanders on private individuals. . . That he had dragged into print, in the most offensive manner, the names of respectable citizens, (*) There is no doubt a generous impulse in our nature, but it is carrying that impulse too far, to elevate into an oppressed hero the man who is suffering the merited consequences of a long course of deliberate and reckless wickedness. Pleas (1) Not guilty; (2) Justification,

much as constitutes the sting of the charge; it is unnecessary to repeat and justify every word of the alleged defamatory matter;[1] it is sufficient if the substance of the libelous charge be justified.[2] "It would be extravagant to say that every comment upon facts requires a justification. But a comment may introduce independent facts, a justification of which is necessary. A comment may be the mere shadow of the previous imputation; but if it infers a new fact the defendant must abide by that inference of fact, and the fairness of the comments must be decided by the jury.[3] Where the alleged libel was that a serious misunderstanding had taken place amongst the Independent Dissenters of M. and their pastor, the plaintiff, in conse-

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setting out articles published in the newspaper, and alleging that they were libelous. Demurrer to the plea of justification, that at most it justified the alleged libel down to the asterisk (*). The plea was sustained. (Stewart *v.* Rowlands, 14 Up. Can. C. P. Rep. 485; citing Brown *v.* Beatty, 12 Up. Can. C. P. Rep. 107.) It is sufficient if the *gist* and *substance* of the libelous matter charged are justified and covered by the matters of fact stated in the answer. Thus where the charge against the plaintiffs was, that they compounded and sold poisonous and deleterious pills, and that the defendant had crushed the system of poisoning pursued by the *scamps* and *rascals*, the gist of the charge is the selling poisonous pills, and therefore it was held that a plea *to the whole declaration*, which justified the charge of selling poisonous pills, without noticing the terms of reproach, *scamp* and *rascal*, was on motion for judgment *non obstante veredicto* held sufficient. (Morrison *v.* Harmer, 3 Bing. N. C. 759.) The court in that case observed that they could not understand the words *scamps* and *rascals*, however offensive, as containing any charge different and distinct from that of which the truth had been justified, and that they were not aware of any authority determining that the justification of the truth of the substantial imputation contained in a libel, is not sufficient unless it extends also to every epithet or term of general abuse, which may be found in the statement of such imputation. On the trial of an indictment for libel, charging that prosecutor was one of a gang of card sharpers, innuendo that he cheated at cards, and the plea stating specific instances of card sharping or cheating at cards, and also that prosecutor confederated with others for the purpose of playing and cheating at cards, and did so play and cheat at various places. Held that it was sufficient to prove the plea in substance, and the jury finding that in two instances plaintiff did cheat at cards, &c., it was not necessary to prove other cases alleged. (Reg. *v.* Labouchere, 14 Cox C. C. 419.)

[1] Edwards *v.* Bell, 1 Bing. 403; Moore *v.* Terrell, 1 N. & M. 559; Cooper *v.* Lawson, 1 Per. & D. 15; Clarke *v.* Taylor, 2 Bing. N. C. 654; Morrison *v.* Harmer, 3 Bing. N. C. 759; 5 Scott, 410; Barrows *v.* Carpenter, 1 Cliff. 204; Cook *v.* Tribune Asso. 5 Blatchf. C. C. 352. See § 358, *post*.

[2] 1 Starkie on Slander, 483.

[3] L'd Denman, Cooper *v.* Lawson, 8 Adol. & El. 753.

quence of some "*personal invective*" from the pulpit by the latter, and that the matter was to be taken up seriously, held that a plea alleging that the plaintiff had spoken from the pulpit of a young lady, naming her, that her conduct was a bad example, and a disgrace to the school, and that she did more harm than good, was a sufficient justification; that such expressions clearly constituted "*personal invective.*"[1] Where the charge was that the plaintiff had been guilty of fornication, it was held sufficient as a justification to allege that the plaintiff was a strumpet, as being a strumpet included the offense of fornication.[2] And where the charge was that in consequence of the plaintiff being in bad repute in the county of O., he would not like to bring his action for libel in that county, held sufficient as a justification to allege that the plaintiff had the reputation in the county of O. of "a proud, captious, censorious, arbitrary, dogmatical, malicious, illiberal, revengeful, and litigious man, and therefore was in bad repute, and would not like to bring his suit there."[3] And to a charge that a plaintiff signed defendant's name to a note without his [defendant's] permission, it was held sufficient as a justification to allege that plaintiff did sign defendant's name to a note without his [defendant's] permission.[4] Where the declaration alleged that plaintiff was cashier to Q., and that defendant, in a letter addressed to Q., falsely wrote and published of plaintiff the words, "I conceive there is nothing too base for him to be guilty of." A plea in justi-

[1] Edwards *v.* Bell, 1 Bing. 403. In an action of slander by a single woman, under the act of 1808 (Rev. Stats. of North Carolina, ch. 110), where the words charged were, "that she had lost a little one," "A. B. is a credit to her," the said A. B. being notoriously an incontinent person, and "she better be listening to the report about herself losing a little one," it was held that it was sufficient to plead that plaintiff was an incontinent woman. (Snow *v.* Witcher, 9 Ired. 346.) But the justification should extend to every part of the defamatory matter which could by itself form a substantive ground of action. (Cooper *v.* Lawson, 8 Adol. & Ell. 751.)

[2] Clark *v.* Munsell, 47 Mass. (6 Metc.) 373; *ante*, in note 1, p. 190.

[3] Cooper *v.* Greeley, 1 Denio, 347.

[4] Creelman *v.* Marks, 7 Blackf. 281.

delivered to defendant an
ng sight thereof, falsely
signature was not his;
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was, on demurrer, held a
ged libel must be under-
ct-matter.[1] The defend-
d a notice that plaintiff
against its by-laws, and
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tent; held that it was a
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ed to a fine or *imprison-*
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derstanding that at its maturity B. should pay only so much of it as was from B. to plaintiff, and plaintiff old retire the note; that B. paid ntiff the amount due from him to plaintiff, but plaintiff did not retire the ; held that neither of these pleas unted to a justification. But there a further justification of the se- d charge, to the effect that plaint- obtained from W. a promissory e for $200, and upon its maturity ined from W. $100 in cash and her note for $100, upon the un- standing that he would retire the note; but plaintiff failed to re- said note, and used the $100 and $100 note for his own purposes; that defendant was entitled to decision of a jury on this justifica- (Brown *v.* Beatty, 12 Up. Can. Rep. 107.)

Alexander *v.* N. E. Railway Co. ur. N. S. 619.

Gwynn *v.* So. E. Railway, 18 Times, N. S. 738. The charge that plaintiff had served a term e penitentiary of New York State.

§ 214. To justify a charge of perjury on the ground of truth, it must not only be alleged that the plaintiff's testimony was false, but that it was willful or corrupt.[1] It would be no justification of such a charge to allege that the false testimony was given by mistake.[2]

§ 215. A justification on the ground of truth must justify in the sense imputed by the innuendo,[3] for the reason that the plea admits the innuendo.[4] Thus, where the plaintiff, an apothecary, was charged with administering medicine to a child, with an innuendo that he had feloniously killed the child, a plea that the plaintiff did injudiciously, indiscreetly and improperly, and contrary to his duty, administer medicine to the child, and that the death of the child was caused or accelerated by the said medicine, was held bad on demurrer, as confessing without jus-

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Plea that plaintiff was convicted and sentenced to two years' imprisonment, and his detention for that time. Replication, that, before plaintiff was imprisoned on said sentence, the conviction was reversed. On demurrer, the replication was held good. (Davis *v.* Stewart, 18 Up. Can. C. P. 482.) Action for publishing of plaintiff that he was a "convicted felon," and a "felon editor," justification that plaintiff had been convicted of felony and sentenced to imprisonment. Replication admitting the conviction and averring that plaintiff had endured the punishment; held at the trial that the publication merely meant that plaintiff had been convicted of felony, and this being true plaintiff could not recover. Upon demurrer to justification, held that plaintiff was entitled to judgment and new trial ordered. The words "felon editor" implied that plaintiff had been guilty of felony, and the justification did not allege that he had actually committed felony, and being pleaded to the whole cause of action was too wide. (Leyman *v.* Latimer, 3 Ex. Div. 470.)

[1] Mitchell *v.* Borden, 8 Wend. 570; Clark *v.* Dibble, 16 Wend. 601; Gage *v.* Robinson, 12 Ohio, 250; Bissell *v.* Cornell, 24 Wend. 354; Gorton *v.* Keeler, 51 Barb. 475.

[2] Fero *v.* Ruscoe, 4 N. Y. 162; Torrey *v.* Field, 10 Vt. 353; The State *v.* Burnham, 9 N. Hamp. 34; Jenkins *v.* Cockerham, 1 Ired. 309. It is not a justification of a charge of false swearing that the defendant had good reasons for publishing the words, and made the publication from good motives and justifiable ends. (Thompson *v.* Bowers, 1 Doug. 321.)

[3] Mitchell *v.* Borden, 8 Wend. 570; Clark *v.* Dibble, 16 Wend. 601; Gage *v.* Robinson, 12 Ohio, 250; Clarke *v.* Taylor, 2 Bing. N. C. 654; Hort *v.* Reade, 7 Ir. Rep. Com. Law, 551. In England defendant may justify the words, either with or without justifying the meaning imputed by the innuendo, or he may do both. (Watkin *v.* Hall, L. R. 3 Q. B. 396.) It must be left to the jury to determine the correct meaning. (Brembridge *v.* Latimer, 12 Week. Rep. 878.) In Ireland defendant must justify the innuendo as well as the words of the alleged libel. (Hort *v.* Reade, Ir. R. 7 C. L. 551.)

[4] Fidler *v.* Delavan, 20 Wend. 57.

tifying the innuendo.[1] But where the language is actionable independently of the meaning imputed by the innuendo, there the innuendo need not be justified, as where the charge was that plaintiff was tried at petty sessions for traveling on a railway without first paying his fare, and convicted in a penalty and costs, and there was an innuendo that the plaintiff had attempted to defraud the company, a plea that plaintiff was so convicted, without attempting to justify the innuendo, was held sufficient. The whole gist of the charge was justified.[2]

§ 216. Although the truth of the defamatory matter is admitted as a defense, a mere *belief in the truth* of the matter published, however honestly that belief may be entertained, will not of itself constitute any defense.[3] Belief

[1] Edsall *v.* Russell, 2 Dowl. N. S. 641; 5 Sc. N. S. 801. Where an intent is charged, it must be justified. (Gage *v.* Robinson, 12 Ohio, 250; Riggs *v.* Denniston, 3 Johns. Cas. 198.) "If the defendant justify specially, it will not be necessary for him in his plea to deny the innuendoes and epithets contained in the declaration, for if the fact be justified (Astley *v.* Younge, 2 Burr. 807), the motive, intention and manner are immaterial," as regards the plea. (1 Stark. on Slander, 476; and see next note, *infra*.)

[2] Biggs *v.* Great Eastern Railway, 18 Law Times, N. S. 482. See Watkin *v.* Hall, L. R. 3 Q. B. 396; Brembridge *v.* Latimer, 12 Week. Rep. 878.

[3] However honestly the party who publishes a libel believes it to be true, if it is untrue in fact, the law implies malice, unless the occasion justifies the act; and whether the occasion justifies the act is a question of law. (Darby *v.* Ouseley, 1 Hurl. & N. 1; Holt *v.* Parsons, 23 Texas, 9.) A *bona fide* belief in the truth of the alleged libel is no defense. (Campbell *v.* Spottiswoode, 3 Best & Smith, 769; 8 Law Times Rep. N. S. 201; and see Moore *v.* Stevenson, 27 Conn. 14; Woodruff *v.* Richardson, 20 Conn. 238; Fry *v.* Bennett, 3 Bosw. 200; Smart *v.* Blanchard, 42 N. Hamp. 137; Wilson *v.* Fitch, 41 Cal. 364; Kerr *v.* Force, 3 Cr. C. C. 8; Watson *v.* Moore, 2 Cush. 133; Hotchkiss *v.* Porter, 30 Conn. 414; Gilmer *v.* Eubank, 12 Ill. 271; Duncan *v.* Brown, 15 B. Monr. 186; Grimes *v.* Coyle, 6 B. Monr. 301; Botterill *v.* Whytehead, 4 L. T. Rep. N. S. 588; Richardson *v.* The State, 66 Md. 205; Fahr *v.* Hayes, 50 N. J. L. R. 275.) It is no defense to an action of slander for imputing larceny to plaintiff, that he [plaintiff] took the property in jest and caused the defendant to believe he [plaintiff] had committed a larceny. (Clark *v.* Brown, 116 Mass. 504.) Nor is it a defense to an action for words imputing unchastity to a woman to show that defendant spoke the words to her, and was led to do so by her general conduct, and especially by her deportment with a particular man, believing the same to be true. (Parkhurst *v.* Ketchum, 88 Mass. [6 Allen], 406.) But belief in the truth may be shown in mitigation. (Huson *v.* Dale, 19 Mich. 35; approving Farr *v.* Rasco, 9 Mich. 353; and overruling Thompson *v.* Bowers, 1 Douglass, 321.) Defendant cannot show that it was generally admitted for many years that the plaintiff was guilty of the crime

or disbelief in the truth of the matter published can be material only upon an inquiry into the intent with which a publication is made. (§ 90.)

§ 217. Legislative proceedings are privileged. It is obviously necessary to the efficient discharge of the duties of a legislator, that in the performance of those duties he should be allowed unlimited license of speech, and be unfettered with any apprehension of being made responsible for the consequences of any utterances he may deem it fitting and necessary to make in his official capacity; accordingly we find it everywhere wisely provided that for what a legislator says as a legislator, and within the legislative chamber, he can never be challenged in any tribunal other than the body of which he is a member. This immunity, enjoyed by the members of the British Parliament in virtue of custom and statutes, is guaranteed to members of Congress by the Federal Constitution, and to members of the State legislatures by State constitutions and statutes.[1] The proceedings of the Eng-

charged (Long *v.* Brougher, 5 Watts, 439); or that plaintiff was reported by her own sister to be guilty of the offense imputed. (Smith *v.* Buckecker, 4 Rawle, 295.) No suspicion, however strong, will amount to a justification. (Powell *v.* Plunket, Cro. Car. 52; Moyer *v.* Pine, 4 Mich. 409.) Common fame is no ground for justifying an extrajudicial charge. (Hutt. 13; Bridg. 62; Brownlow, 2.) A defendant cannot justify a charge of theft by showing that he has just grounds for believing the plaintiff to be a very dishonest man. (Woodruff *v.* Richardson, 20 Conn. 238.) The publication in a newspaper of rumors is not justified, but may be mitigated by the fact that such rumors existed. (Skinner *ads.* Powers, 1 Wend. 451; § 411, *post.*) In mitigation of damages, in an action for a libel, the defendant was allowed, under the general issue, to show that he copied the statement from another newspaper, but was not allowed to show that it appeared concurrently in several other newspapers. (Saunders *v.* Mills, 6 Bing. 213; 3 M. & P. 520.) In an action for a libel in the defendant's newspaper, held that he could not show that it was copied from another paper, against the proprietor of which damages had been recovered, but he might show that he had omitted many of its parts reflecting on the plaintiff. (Creevy *v.* Carr, 7 C. & P. 64; and see Creighton *v.* Finlay, Arm. Mac. & Og. 385; see *ante*, note 3, p. 301.

[1] 2 Hume's Hist. of England, 280; Statutes, 4 Hen. VIII; 1 W. & M. st. 2, ch. 2; Bradlaugh *v.* Gossett, 12 Q. B. D. 283. Members of the House of Lords, as such, cannot be guilty of a conspiracy to libel. (*Ex parte* Wason, Law Rep. 4 Q. B. 573.) The Constitution of New York (Const. of 1846, art. 3, § 12) enacts, "For any speech or debate in either house of the legislature, the members shall not be

lish Parliament are, *in theory*, conducted with closed doors, and although in fact reporters and others are usually present during the debates, yet persons so present are supposed to be concealed, and the fact of their presence to be unknown to the House. All persons not members are liable to be expelled on a member or the clerk of the House rising and stating, "Mr. Speaker, there are strangers present." This intimation is always made prior to a division, and all persons not members, nor officers of the House, without exception, retire. It is a part of the same theory which forbids the publication, unless by order of the House, of any of its proceedings, and which makes any publication of its proceedings, without such order, a criminal contempt.[1] Congress has never asserted, at least as directly as the British

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questioned in any other place." This provision is repeated in exactly the same words, 1 Rev. Stat. of New York, 154, § 11. Offensive words in debate not to be regarded unless noticed at once. (Cushing's Manual; and see The People *v.* Amer. Institute, 44 How. Pr. R. 468.)

A member of the legislature is not liable to an action of slander for words spoken in the discharge of his official duties, even though spoken maliciously. (Coffin *v.* Coffin, 4 Mass. 1, 31; Dillon *v.* Balfour, 20 Law Rep. Ir. 600; but see Commonwealth *v.* Blanding, 3 Pick. 310, 314.) But this privilege is not extended to words spoken unofficially, though in the legislative hall, and while the legislature is in session. (Coffin *v.* Coffin, 4 Mass. 1.) Thus, where one member informally communicated to another, within the representatives' hall, and while the House was in session, that the statement which he had just made to the House upon some question lately under consideration, and likely again to be acted upon, was founded upon misrepresentation, and that his informant was a person not to be believed, using some slanderous expression in regard to the informant, it was held that the slander was not privileged by the place or occasion. (*Ib.*)

[1] When Sir Bartholomew Shower published his collection of decisions in the House of Lords, still cited as "Shower's Parliamentary Cases," the publication was voted to be a breach of privilege, and the House of Lords resolved: "That it is a breach of privilege of this House for any person whatsoever to print or publish in print, anything relating to the proceedings of this House, without the leave of this House." Lord Hardwicke, in 1762, threatened to put this resolution in force against Sir Michael Foster, for introducing, without leave, into his treatise on Common Law, some decisions of the House of Lords. So, too, it was a standing order of the House of Lords, until rescinded on the motion of Lord Campbell, to enable him with safety to publish his Lives of the Lord Chancellors, "that no one presume to publish the lives of any lords, spiritual or temporal, deceased, without the permission of their heirs or executors." (6 Camp. Lives Chanc. 221.) Contempt by publication of libel on member of Parliament, *Re* Dill, 1 Wyatt & Webb Law Rep. 171 (Victoria).

Parliament, the right to sit with closed doors, or to control the publication of its proceedings. The twelfth rule of the House of Representatives provides for clearing the galleries in cases of disorderly conduct, and the fourteenth rule provides for the admission, by the Speaker, of stenographers wishing to take down the debates.[1] The immunity accorded to speech in legislative assemblies extends to any record such assemblies may make of their proceedings, and to all documents read in such assemblies; it extends also to all petitions or addresses presented to the legislature, and to such a prior publication of any such documents as may be necessary to their preparation and completeness.[2]

§ 218. The immunity which is accorded to a legislator while in the performance of his duties, does not extend so far as to justify his repeating, not in his official capacity, any defamatory matter he may have written or spoken while in the discharge of his duties; and therefore for any repetition by a legislator outside of the legislative cham-

[1] The Constitution of the State of New York of 1777, § 15, enacted that: The doors both of the Senate and Assembly shall at all times be kept open to all persons, except when the welfare of the State shall require their debates to be kept secret. . . This provision was repeated in the Constitution of 1823, art. 1, § 4, but not in the Constitution of 1846. The Revised Statutes of New York (1 R. S. 153, § 4) provide: The doors of each house are to be kept open, except when the public welfare shall require secrecy. The Constitution of the United States, art. 1, § 5, subd. 3, provides: That each house (of the legislature) shall keep a journal of its proceedings, and, from time to time, publish the same, excepting such parts as may in their judgment require secrecy. The Constitutions of New York of 1777, § 35, and of 1823, art. 1, § 4, required both branches of the State legislature to keep a journal of their proceedings, and to publish the same; and the Revised Statutes of New York (1 R. S. 153, § 3) enact: Each house is required to keep a journal of its proceedings, and to publish the same, except such part as may, in its judgment, require secrecy.

[2] Where a petition to Parliament, containing defamatory matter, was referred to a committee, held that no action would lie for printing and distributing a number of copies for the use of the members. (Lake *v.* King, 1 Mod. 58; 1 W. Saund. 131*b*; see *post*, note to § 221.) The English House of Commons resolved that it was a breach of the privilege of that house to sue at law for a libel, supposed to be contained in a petition to that body. (See 1 Salk. 19; 3 Salk. 17; Holt, 524.)

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s place in Parliament, is privileged. wison *v.* Duncan, 7 Ell. & Bl. 229; d. Campbell's Lives of the Chief ices, 167; see Dillon *v.* Balfour, aw Rep. Ir. 600.) Horne Tooke ied for a criminal information ist a bookseller for publishing a of a report made by a committee he House of Commons. The rule discharged, partly because the rt did not appear to bear the ning imputed to it, and partly be- the court doubted its right to fere. (Rex *v.* Wright, 8 Term 293.)

In Stockdale *v.* Hansard, 9 Adol. Cl. 1; 2 M. & Rob. 9; 3 Per. & D. 7 Car. & P. 731, it was held to o defense, in an action for libel, the defamatory matter was con- ed in a report of parliamentary eedings and was published by or- f the House of Commons. As is case, see May's Law and Prac- in Parliament, 156, and Report to House of Commons of a Select mittee on the Publication of ted Papers, May, 1836, with an endix of the orders and proceed-

In consequence of that decision a statute was passed legalizing the publication *by the orders of the Parliament Houses*, of such reports, papers, votes or proceedings, as either House should deem necessary.[1] In the State of New York, the publication in a newspaper of legislative proceedings and debates is, by statute, conditionally privileged.[2] Until quite recently, it was generally supposed that the publication of defamatory matter in a report of the proceedings in Parliament was not justifiable on the ground of its being a fair report, but from the decision in Wason *v.* Walter, it seems that such a publication is justified by the fairness of the report.[3]

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ings of the two Houses of Parliament relating to the publication of parliamentary reports and papers and review of the legal authorities upon the jurisdiction of Parliament on matters of privilege.

[1] 3 and 4 Vict. ch. 9. Defendant may, under the general issue, prove an order to publish, and the absence of malice, which entitles him to a verdict.

[2] Laws of New York, 1854, ch. 130; see *post*, Freedom of the Press, § 252, and note to § 229.

[3] Lord Campbell: "I think it should be declared and enacted that a fair and faithful report of proceedings in either House of Parliament, from which strangers are not excluded, is justifiable, and cannot be made the subject of any action or prosecution." Lord Denman: "I cannot help entertaining a strong opinion that no faithful report of a debate ought to expose the publisher to an action or to a criminal proceeding. As the law now stands, the fact of the report being a faithful one is nothing like a justification, but it ought to be." (Report from Committee of House of Lords on the Law of Defamation and Libel, July, 1843.)

In the case of Wason *v.* Walter, reported in the London Times of the 19th, 20th, and 21st of December, 1867 (Law Rep. 4 Q. B. 73), the plaintiff, a member of the bar, sent a petition to Earl Russell for presentation to the House of Lords, praying an inquiry into a complaint he alleged against the Lord Chief Baron of the Court of Exchequer. In the debate on the presentation of this petition, the friends of the Lord Chief Baron cast imputations upon the plaintiff. A report of this debate, and a leading article in reference thereto, appeared in the London Times, of which the defendant was the proprietor. For the publication of this report and leading article the action was brought. The defenses were, that the report was a true report, and that the leading article was a just and fair comment upon the proceedings in the debate. It was admitted that the matter was defamatory in its character, and the only questions were: (1) Was it a defense to say the matter was a correct report of a proceeding in Parliament? and (2) Was it the subject of criticism? The Lord Chief Justice charged the jury: The report being fair and correct, "I am prepared to direct you, in point of law, that the report is a privileged communication, and one which is not the subject-matter of an action." And after stating that the question was then for the first time directly presented for adjudication, and that some dicta supported his ruling, he added: "The cases have not hitherto gone the length of establishing the law I

§ 220. Defamatory matter published in or to a court of criminal jurisdiction may constitute the wrong called "*malicious prosecution*,"[1] but only under the circumstances hereafter referred to can such a publication amount to the wrong called slander or libel. Thus, where a defendant went before a justice of the peace, and demanded a warrant against the plaintiff for stealing his ropes, the justice said, "Be advised, and look what you do," and the defendant replied, "I will charge him with flat felony, for stealing my ropes from my shop;" in an action of slander for speaking these words, the court agreed that the words being spoken to a justice of the peace, on an application for a warrant which was lawful, would not support an action, for if they would, no other would come to a justice of the peace to inform him of a felony.[2] Every one having

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am now laying down, but I find nothing which to my mind satisfactorily contradicts the position I adopt." And again: "There may be dicta which may possibly have a different tendency, but, I think, with the larger and more enlightened views relative to the law of libel which have gradually developed themselves in our day, the time has come when the proposition I have put ought to be affirmatively announced." As to the second point, the charge was: "I am of opinion that the debate in the House of Lords upon the plaintiff's petition was a matter of public interest and concern upon which a public writer was perfectly justified in making such comments as the circumstances warranted." The plaintiff tendered a bill of exceptions to this charge. The jury gave a verdict for the defendant. A motion for a new trial was denied. (Law Rep. 4 Q. B. 73.) The Lord Chief Justice has shown by his charges in all the cases of libel tried before him, that he favors the greatest latitude of newspaper criticism. For his views on the right of criticism, reference may be had, in addition to the above case, to the case of Dr. Hunter *v.* The Publisher of the Pall Mall Gazette, printed in pamphlet form, and in the Pall Mall Gazette of Nov. 27, 28, 29, 30, Dec. 1, 3, 1866; S. C. Hunter *v.* Sharpe, 15 Law Times, N. S. 421; 4 Fost. & F. 983; and *post*, note to § 256,

[1] "An action for libel is upon all fours with action for a malicious prosecution. The latter is but an aggravated form of an action for libel, as in it the libel is sworn to before a magistrate." (Briggs *v.* Garrett, 111 Penn. St. 404.) It is "malicious prosecution," and not what we term "slander or libel," which corresponds to "calumny" in the civil law. In the Roman law, calumny signified an unjust prosecution or defense of a suit, and a calumniator was one who unjustly accused others in a court of law. (See Domat's Civil Law, bk. 3, tit. 5, § 2, div. 14, note, ed. by Strahan.) Calumny is still employed in this sense in the courts of Scotland, and was so employed in the ecclesiastical and admiralty courts of England. (See Dunlap's Adm. Pr. 291, and *post*, notes to §§ 221, 347.)

[2] Pierce *v.* Oard, 37 No. West. Rep. (Neb.) 677; Ram *v.* Lamley, Hutt. 113. An action for slander does not lie for a charge of a criminal of-

reasonable and probable grounds for believing that a crime has been committed, has the right to communicate his belief to the magistrate having jurisdiction of such offense.[1] The existence of reasonable and probable cause for the belief is absolutely necessary to create this right; a communication made without these grounds is inexcusable, and is a malicious prosecution, for which a remedy is provided by action, but the remedy is not by an action for slander or libel. This results from the rules of pleading and the classification of actions into several different *forms* (§ 53) or *causes of action*, and operates even in those States where it has been expressly enacted that all forms of action are abolished.[2]

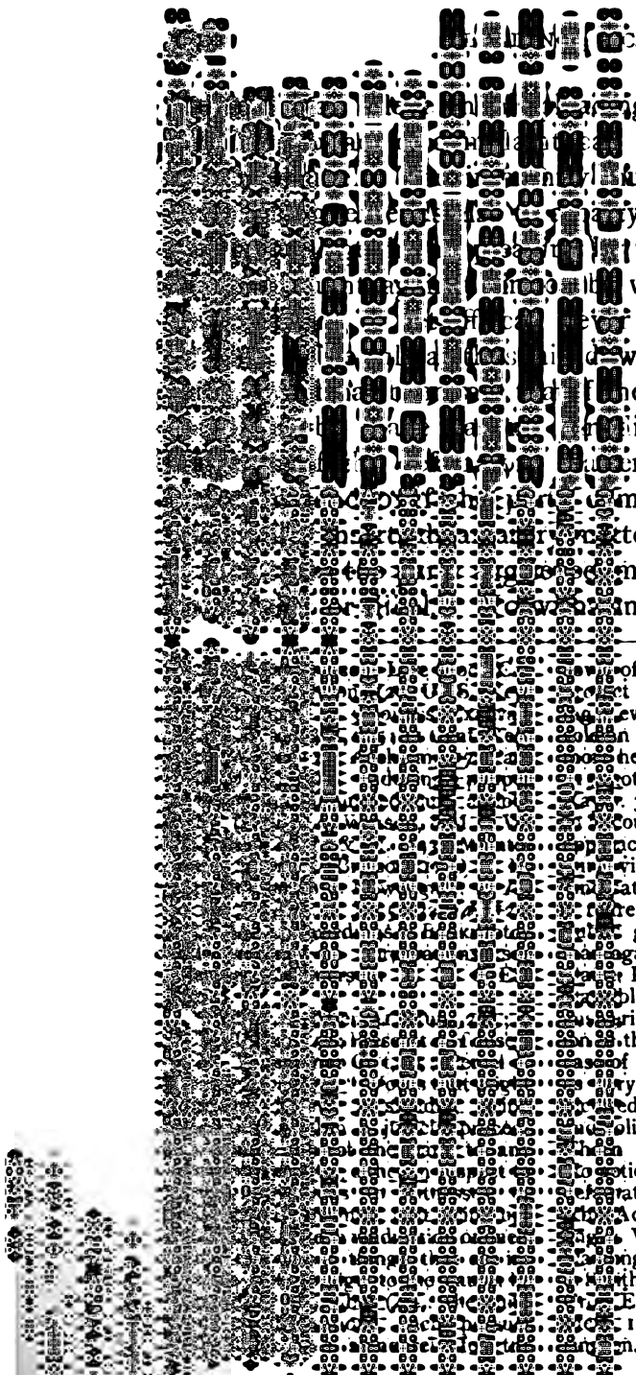
§ 221. The right of appealing to the civil tribunals is more extensive than the right of appealing to the criminal tribunals[3] (§ 419). In a civil action, whatever the com-

fense made to a magistrate upon which a warrant issues, although the accused be discharged after examination. (Shock *v.* McChesney, 2 P. A. Browne's R. 6, App.; Cohen *v.* Morgan, 6 D. & R. 8; 2 Stark. Sland. 72, note *t;* and see *post*, note to § 221.) But after making a charge to the magistrate, defendant cannot justify repeating the charge out of court. (Pierce *v.* Oard, 37 No. West. Rep. [Neb.] 677.) Communications to the public prosecutor are privileged. (Vogel *v.* Gruaz, 110 U. S. R. 311.)

[1] Lister *v.* Perryman, Law Rep. 4 Ho. of L. Cas. 521; reversing S. C. Law Rep. 3 Ex. 197.

[2] This result is brought about as thus: If the plaintiff shows on the face of his (declaration) complaint that the publication was made to a court of criminal jurisdiction, he does not show a cause of action unless he alleges *inter alia* that the publication was made without reasonable or probable cause. But if the (declaration) complaint does not disclose that the publication was made to a court of criminal jurisdiction, then it would be a complete defense that the publication was made to a court of criminal jurisdiction; which defense could not be avoided by replying or proving on the trial that the publication was without reasonable or probable cause, as that would be in the one case a *departure*, in the other a *variance*. (See Torrey *v.* Field, 10 Vt. 353, and Malicious Prosecution, *post*.)

[3] "No punishment was ever appointed for a suit in law, however it be false and for vexation." (6 Robinson's Pr. 897, citing numerous authorities.) But in Churchill *v.* Siggers (3 El. & Bl. 929), it is said: "One man has a right to sue another, but if one sue another with malice and without reasonable cause, it is a wrong." The action is not for maliciously putting the process in force, but for maliciously abusing the process of the court. (Granger *v.* Hill, 4 Bing. N. C. 212; see Quartz Hill Cons. Gold Mine Co. *v.* Eyre, 49 L. R. N. S. 249; Bartlett *v.* Christholf, 69 Md. —; Wren *v.* Weild, Law Rep. 4 Q. B. 736; Collins *v.* Cave, 4 H. & N. 225; 6 *Id.* 131; Walker *v.* Goe, 3 H. & N. 395; 4 *Id.* 351; Murray *v.* McLane, 2 Car. Law Repos. 186; Closson *v.* Staples, 42



g as or in connection never give a right of us enjoyed by a party y defending; whatever way of defense to the way of counter-charge, r give a right of action wn has been doubted by e tribunal to which the iction of the subject- r be irrelevant to the mplaining or defending tter in his pleading, that may maintain his action nding the dicta to the

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of a judicial procedure cannot t him, since the design of injur- evident, and the more public and n it is, the injury is so much the heinous." (Borthwick on Libel, ote; see Rex *v.* Salisbury, 1 Ld. r. 341.) If he (a party appealing court of competent jurisdiction) aches the council with other than views; if, under the mask of ating his violated rights, seeking ress for injuries, or removing a grievance, he calumniates the against whom he prefers his com- I can discover no legal or even ble ground to shield him from ring as a libeler; and the opin- the court, from 4 Co. 14, in the of Buckley *v.* Wood, I consider y apposite to this case It is d by sound principles of law olid sense. (The Chancellor, in n *v.* Blanchard, 5 Johns. 525.) tion of slander or libel lies for atory matter in a pleading (Vin. Act. for Words, C, *a*, 19; Daw- Wenman, 2 Show. 446; S. C. ng *v.* Venman, 3 Mod. 108; Cox th. 1 Lev. 119; Brown *v.* Michel, Eliz. 500; Hoar *v.* Wood, 3 193; Goslin *v.* Cannon, 1 Har- n, 3; Briggs *v.* Byrd, 12 Ired.

contrary, we believe the better and the prevailing opinion to be, that for any defamatory matter contained in a *plead-*

377; Shelfer *v.* Gooding, 2 Jones [N. Car.], 175; Lea *v.* White, 4 Sneed, 111), as in a bill in equity (Forbes *v.* Johnson, 11 B. Monr. 48; Strauss *v.* Meyer, 48 Ill. 385), or a writ or declaration (Hardin *v.* Cumstock, 2 A. K. Marsh. 480), although the charge be groundless. (Hill *v.* Miles, 9 New Hamp. 9.) Where one addresses a complaint to persons competent to redress the grievance complained of, no action will lie against him, whether his statement be true or false, or his motives innocent or malicious. (Thorn *v.* Blanchard, 5 Johns. 508.) And it is at least doubtful whether a want of jurisdiction in the court to which a complaint may be exhibited will make it a libel, because the mistake of the court is not imputable to the party but to his counsel. (*Id.*; Lake *v.* King, 1 W. Saund. 132; Hawk. Pl. Cr. 73, § 8; *contra*, Buckley *v.* Wood, 4 Co. 14.) That was the case of a bill in the Star Chamber; as to part of the matter the court had, and as to part had not jurisdiction; the latter being defamatory, held to be actionable. So no action lies for words spoken on giving a party in charge to a constable, or in preferring a complaint to a magistrate. (Johnson *v.* Evans, 3 Esp. 32.) But the privilege is confined strictly to communications which are necessary for obtaining redress or forwarding the ends of justice. Thus, where A. obtained a warrant to search the house of B. for goods suspected to be stolen, and in accompanying the officer to execute the warrant, told the officer that B. had robbed him, held that this statement was not privileged. (Dancaster *v.* Hewson, 2 Man. & R. 176.) See Lathrop *v.* Hyde, 25 Wend. 448, where, under a similar state of circumstances, the action was held maintainable, the jury finding express malice. And see Fitzsimmons *v.* Byrne, 12 Low. Can. R. 390. Where defendant, before making any complaint to a magistrate, made a charge against plaintiff to C., a constable, adding that he should require C. to serve the warrant on plaintiff, held this was not a privileged communication; and where, after plaintiff had been acquitted before the justice, the defendant repeated the charge against the plaintiff, held this was not a privileged communication. (Burlingame *v.* Burlingame, 8 Cow. 141.) Whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor, or counsel therein, if pertinent and material to the matter in controversy, is privileged and lays no foundation for a private or public prosecution. The protection is absolute, and no one shall be permitted to allege that it was said or written with malice. But if a party or his agent pass beyond the prescribed limit to asperse or vilify another, he is without protection, and must abide the consequences. (Wyatt *v.* Buell, 47 Cal. 624.) As where a person acting as counsel in a justice's court prepared and presented a declaration, charging the defendant with a trespass and alleging that the defendant was "reputed to be fond of sheep," "in the habit of biting sheep," and that "if guilty, he ought to be shot;" held, that an indictment therefor as a libel, alleging malice, was good. (Gilbert *v.* The People, 1 Denio, 41; see Lea *v.* White, 4 Sneed, 111; Buchs *v.* Barker, 6 Heisk. 404; Davis *v.* McNees, 8 Humph. 40.) If a party institute a proceeding in a court of justice as a pretense, and merely to promulgate slander, or to serve any other improper purposes, an action may be maintained for any libelous matter contained in it. (Hill *v.* Miles, 9 New Hamp. 9.) Where words accusing the plaintiff of felony were spoken to a justice, on an application for a warrant for felony, the question whether they are actionable or not depends upon the question whether they were made in good faith or not, and that question should be left to the jury. (Bunton *v.* Worley, 4 Bibb. 38; and see Marshall *v.* Gunter, 6 Rich. 419;

ing in a court of civil jurisdiction, no *action for libel* can be maintained;[1] the power possessed by courts to strike out *scandalous* matter from the proceedings before them,[2]

Briggs *v.* Byrd, 12 Ired. 377.) A letter addressed to a judge before whom a proceeding is pending, being an irregular and improper proceeding, is not privileged. (Gould *v.* Hulme, 3 C. & P. 625.) For such a letter the writer may be punished as for a contempt. (*Ex parte* MacGill, 2 Fowl. 474; Eagleton *v.* Duchess of Kingston, 8 Ves. 467.) An affidavit made before a magistrate to enforce the law against a person accused therein of a crime, does not subject the accuser to an action for libel, though the affidavit be false and insufficient to effect its object. (Hartsock *v.* Reddick, 6 Blackf. 255.) Under statute 5 & 6 Vict. ch. 109, the vestry, on precept from the justices are to return a list of parishioners liable to serve as constables, and to give notice when and and where objections will be heard by the justices, who are empowered to strike out of the list the names of persons not liable to serve. Plaintiff's name was inserted in the list of persons liable to serve, and he attended a session to be sworn in, when the defendant, a parishioner, objected to him and made a statement to the justices, in the presence of other persons, imputing perjury to plaintiff. In an action for slander, the jury found that defendant made the statement *bona fide*, believing it to be true. Held that the statement was properly made before the justices, and was a privileged communication. (Kershaw *v.* Bailey, 1 Exch. 743; 17 Law Jour. R. 129, Ex.; and see 10 Law Times, 289; and *ante*, note 1, p. 331; and *post*, § 222.)

[1] The Superior Court of New York, in Prescott *v.* Tousey, 53 N. Y. Superior Ct. Rep. 65, an action for libel in a bill of particulars, say, they do not accept this sentence to its full extent, but in that case held the alleged defamatory matter in the pleading absolutely privileged, because as the opposite party had not had it stricken out as irrelevant or redundant it must be considered as relevant to the matters in issue. The court impliedly say that where the matter is irrelevant or redundant an action might be maintained. That does not conflict with our statement in the text, we say an action for *libel* cannot be maintained; there may be cases where what would have been formerly designated a *special action on the case* can be maintained. Such an action is more nearly an action for malicious prosecution than for a libel. (See *ante*, note 2, p. 331.) Circulating copies of pleadings containing defamatory matter, held punishable as a contempt of court. (Bowden *v.* Russell, 46 L. J. [Ch.] 414.)

In Dada *v.* Piper, 41 Hun, 254; 1 N. Y. St. Rep. 152, the alleged libel was contained in a complaint in a civil action. It was admitted there was no publishing other than was incident to the conduct of the action, and there was no proof of malice, the complaint was dismissed on the ground that the publishing complained against was privileged. In affirming the dismissal the court said: Plaintiff should have shown that defendant knew his allegation was false; that he maliciously "made use of the legal proceedings in bad faith as a cloak to his libelous utterances."

The view of the law as laid down in our text was approved and followed. (Lanning *v.* Christy, 30 Ohio St. 115; and see 17 Alb. L. J. 78; Bartlett *v.* Christhilf, 69 Md. —; Moody *v.* Libby, 1 Abb. N. C. 154.

[2] King *v.* Sea Ins. Co. 26 Wend. 62; Powell *v.* Kane, 5 Paige, 265; affi'g 2 Edw. Ch. 450; Somers *v.* Torrey, 5 Paige, 54; Downing *v.* Marshall, 37 N. Y. 382; Mitchell *v.* Kerr, Rowe's Rep. 537; Strauss *v.* Meyer, 48 Ill. 385; Christie *v.* Christie, L. R. 8 Ch. 499. And no action lies for the publication of the matter ordered to be struck out. (Kennedy *v.* Hilliard, 10 Ir. C. L. R. N. S. 195.)

and to punish as for a contempt, is considered a sufficient guaranty against the abuse of this privilege;[1] but whatever may be the reason, it seems certain that where there is a perversion of the right, "the policy of the law steps in and controls the individual right of redress."[2]

§ 222. The protection which is accorded to *a pleading* extends to every other proceeding in a civil action,[3] and

[1] Henderson *v.* Broomhead, 4 Hurl. & N. 577; Astley *v.* Younge, 2 Burr. 807. The action of slander does not lie for a criminal charge made by an affidavit before a magistrate, the plaintiff's remedy being by an action for malicious prosecution or arrest, or for maliciously suing out a search warrant. (Sanders *v.* Rollinson, 2 Strobh. 447.) No proceeding according to the regular course of justice will make a complaint or other proceeding amount to a libel for which an action can be maintained; and a distress warrant is a proceeding given to the party by law, for the purpose of enforcing a legal right, and comes directly within the reason of the rule. (Bailey *v.* Dean, 5 Barb. 297.) When a requisition is presented for the arrest of a fugitive from justice, with the proper vouchers, according to the act of Congress, it is the duty of the executive to cause the fugitive to be arrested and delivered to the agent appointed to receive him, and the governor has no power to entertain an application to recall or modify such warrant, and an affidavit to support such an application is not a privileged communication. (Hosmer *v.* Loveland, 19 Barb. 111.) A complaint to the grand jury, containing a charge of perjury, is privileged, although before its presentation it was exhibited to various persons, by whom it was signed. (Kidder *v.* Parkhurst, 3 Allen [Mass.], 393; see Lake *v.* King, 1 Mod. 58; Vanderzee *v.* McGregor, 12 Wend. 545; Klinck *v.* Colby, 46 N. Y. 430.) And the delivery of a pleading or process to a third person for service on defendant is not such a publication as will give a cause of action, *i. e.*, take away the privileged character of a pleading or process. (Bank of Brit. N. Amer. *v.* Strong, 1 App. Cas. 307; Sands *v.* Robison, 12 S. & M. 704.) In King *v.* Townsend (2 Law Rep. 126; Appendix, *post*), which was an action for libel contained in an affidavit voluntarily made by the defendant before a magistrate—the report does not state under what circumstances—Abbott, Ch. J., said: "This action is maintainable. This affidavit is not a judicial proceeding, for it is the mere voluntary affidavit of the defendant, and if such an affidavit were to be considered as a judicial proceeding, and therefore privileged, it would afford a very easy recipe for a libeler to traduce the characters of the most innocent persons." (See note, p. 337, *post*.) A third party has not any privilege if he publishes defamatory pleadings. (Barber *v.* St. Louis Dispatch Co. 3 Cent. Law Jour. 360.) An attorney may be disbarred for defamatory matter in a pleading. (People *v.* Green, Colo. Sup. C't. 35 Alb. L. J. 456.)

[2] Thorn *v.* Blanchard, 5 Johns. 530; and see Wilson *v.* Sullivan, 7 So. East. Rep. (Ga.) 274; Thompson *v.* Powing, 15 Nev. 195; Mass *v.* Meire, 37 Iowa, 97.

[3] An attorney's bill of costs, although delivered under a judge's order, is not a legal proceeding, and is not within the above rule. The plaintiff having obtained an order for defendant, his late attorney, to deliver a bill of costs, defendant delivered a bill headed, "Relative to your defalcations," which phrase was repeated in several parts of the bill. In an action of libel for this statement, it

therefore for anything contained in *an affidavit* or other proceeding made in the course of an action or proceeding, no action for libel can be maintained. The privilege is much more extensive than in many other cases. No liability attaches for actual malice in the publication, provided only that the matter complained against is *pertinent*. And where the matter is not *pertinent*, yet, if published without malice, it is privileged within the rule applicable to a publication, not being of a pleading or proceeding in an action.[1] Where an attorney sued his client for professional services, the client gave notice, under the general

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was claimed that the bill, having been delivered under a judge's order, was a legal proceeding, and privileged, but it was ruled otherwise, and plaintiff had a verdict. (Bruton *v.* Downes, 1 Fost. & F. 668.) Where the alleged libelous language was contained in written interrogatories propounded to a witness in a suit, it was held to be privileged. (Lawson *v.* Hicks, 38 Ala. 279; Marsh *v.* Elsworth, 50 N. Y. 309; affi'g 2 Sweeny, 589; 1 *Id.* 52.) A petition for appointment of a guardian is privileged. (Ruohs *v.* Backer, 6 Heisk. [Tenn.] 395; 36 Alb. L. J. 503.) Defendant made an affidavit that plaintiff had subscribed certain cotton to the confederate cotton loan, and had not paid the same, in consequence of which the government agents had seized said cotton—held, such affidavit, although untrue, was privileged. (Reid *v.* McLendon, 44 Ga. 156.) No action for defamatory matter in a bill for an injunction (Wilson *v.* Sullivan, 7 So. East. Rep. [Ga.] 274), nor for defamatory matter in a petition by one receiver for the removal of his co-receiver. (Bartlett *v.* Christhilf, 69 Md. —; 38 Alb. L. J. 151.) Defamatory matter in an application to a justice of the peace to substitute an officer to summon a jury, held privileged only if made in good faith and pertinent. (Rainbow *v.* Benson, 71 Iowa, 301.) So of defamatory matter in an affidavit to answer a bill praying an injunction. (Hart *v.* Baxter, 47 Mich. 198.) So of defamatory matter in a complaint to a magistrate. (Pierce *v.* Oard, 37 N. W. Rep. [Neb.] 677.) So of defamatory matter in order on an attorney to pay over moneys to his client. (Hawk *v.* Evans, 41 No. West. Rep. [Mich.] 368.) Publication in alleged aid of legal proceedings not justified if no such proceeding. (Mallory *v.* Pioneer Press Co. 34 Minn. 52.) No action for matter in answer (Lansing *v.* Christie, 30 Ohio St. 115), or bill of particulars (Prescott *v.* Tousey, 53 Superior Ct. [21 J. & S.] 56; Moore *v.* Manuf. Bk. 21 N. Y. St. Rep. 652).

In a prosecution before a justice of the peace for unlawfully selling intoxicating liquors, an affidavit in support of an application to the justice to designate some constable other than the one proposed by said justice to summon the jury, which alleges that said constable is prejudiced and is colluding with defendant and men in the saloon business to prevent their conviction, and is in the habit of selecting men for the jury who are opposed to the enforcement of the prohibitory law, is a *prima facie* privileged communication. (Rainbow *v.* Benson, 71 Iowa, 301.)

[1] Moore *v.* Manuf. Bk. 21 N. Y. St. Rep. 655; 51 Hun, 472; citing Marsh *v.* Elsworth, 50 N. Y. 309, and other cases.

issue, that he would prove that the attorney conducted the prosecution and defense of the several suits, and attended to the other professional business in the declaration mentioned, in so careless, unskillful and improper a manner as to render such service of no value; the attorney moved to strike out the notice as false; the client resisted this motion upon an affidavit of his own, stating that the attorney had revealed confidential communications of the client relative to a portion of the business to a third person, to the client's prejudice. For the allegations in this affidavit the attorney brought an action of libel against the client, and in his declaration set out the facts to the effect stated above, and charged that the allegations of the affidavit were false, malicious, and impertinent; a demurrer to the declaration was sustained, and it was held that the affidavit was pertinent to the motion, and the truth or falsity could not be questioned in an action for libel.[1] In a case where the publication of a proceeding in an action is actionable, the aggrieved party need not wait until the

[1] Garr *v.* Selden, 4 N. Y. 91; rev'g 6 Barb. 416. In Doyle *v.* O'Doherty (1 Car. & M. 418), it was held that in an affidavit in answer to the application of the plaintiff for a criminal information against the defendant for sending a challenge, the defendant was justified in stating any matters, however defamatory and otherwise libelous, to prevent the court making the rule absolute, and that no action could be sustained for anything contained in such an affidavit. (See Rosenburg *v.* Nesbit, 14 N. Y. St. Rep. 248.) The facts are not given. While the action appears to be for slander, the opinion speaks of defendant putting his hand to the defamatory document, and as defendant was a volunteer in the legal proceedings, the fact of the libel being in an affidavit is unimportant, and does not afford any privilege.

A., in opposing a motion for an injunction against him, contradicted a material fact in the moving affidavit of W., and swore that W. knew its falsity, and had been guilty of perjury; held that an action for libel could not be maintained by W. for the allegation in A.'s affidavit. (Warner *v.* Paine, 2 Sandf. Sup. Ct. 195; and see Suydam *v.* Moffat, 1 *Id.* 495.) No action can be maintained for defamatory matter in an affidavit used in the course of a cause, even where the party defamed is not a party to the cause. (Henderson *v.* Broomhead, 4 Hurl. & N. 569; Revis *v.* Smith, 18 C. B. 126; Dawling *v.* Venman, 3 Mod. 109; Kennedy *v.* Hilliard, 10 Ir. Com. Law Rep. 195, C. P.; 1 Law Times, N. S. 578; Gilden *v.* O'Brien, 10 Ir. Com. Law Rep. 230, C. P.; 4 Ir. Jur. N. S. 291; see *ante*, note 1, p. 335.)

termination of the action in which such proceeding was had to bring his suit.[1]

§ 223. The act of testifying as a witness must be either in the exercise of a right or the performance of a duty, and in either case the act must be performed in good faith (§ 40), or it will be wrongful. If, therefore, one avails himself of the occasion of his position as a witness "to maliciously answer the questions put to him," and with a knowledge that his answer is not pertinent or relevant, then the law withdraws the protection it would otherwise have afforded him.[2] Where the defendant, a witness, was asked if a certain person was attended by a physician, his answer was, "Not as I know of; I understood he had a quack; I would not call him a physician," on an action brought for these words, it was held proper to charge the jury that if they "believed from all the circumstances proved, from the questions put, from the manner of answering, and from the answers themselves, that the defendant testified in good faith, or in the belief that his answers were pertinent or relevant, then the law protected him; but if the defendant was actuated by mere malice, and used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him."[3] The foregoing is the view

[1] Hodges *v.* Hochelaga, 7 Legal News, 353 (Quebec).

[2] Smith *v.* Howard, 28 Iowa, 51; Marsh *v.* Elsworth, 50 N. Y. 309; affi'g 2 Sweeny, 589; 1 *Id.* 52. In Shodden *v* McElwee, 5 So. West. Rep. (Tenn.) 602, held that where a witness voluntarily, maliciously and irresponsively interjects defamatory matter into his answers, he is liable for slander. In that case the court took occasion to say that our view, as stated in the text, is plausible but unsound. (36 Alb. L. J. 502.) Reference is made to Smith *v.* Howard, 28 Iowa, 51; Barnes *v.* McCrate, 32 Maine, 442; Calkins *v.* Sumner, 13 Wis. 193; McLaughlin *v.* Cowley, 127 Mass. 316.

In Hunckel *v.* Voneiff, 69 Md. ——, 14 Atl. Rep. 500, the Court of Appeals of Maryland sustained and followed our views. (See also Goffin *v.* Donnelly, 6 Q. B. D. 327.)

[3] White *v.* Carroll, 42 N. Y. 161. In Barnes *v.* McCrate (32 Maine, 442), Perkins *v.* Mitchell (31 Barb. 461), Smith *v.* Howard (28 Iowa, 51), it is said: "The witness is not liable if the answers are pertinent and responsive." And in Marsh *v.* Elsworth (50 N. Y. 309; affi'g 2 Sweeny, 589; 1 *Id.* 52),

taken on this subject by the courts of New York, Iowa, Maine and Tennessee, but we cannot concur in that view. The due administration of justice requires that a witness should speak, according to his belief, the truth, the whole truth, and nothing but the truth, without regard to the consequences; and he should be encouraged to do this by the consciousness that, except for any willfully false statement, which is perjury, no matter that his testimony may in fact be untrue, or that loss to another ensues by reason of his testimony, no action for slander can be maintained against him.[1] It is not simply a matter between individuals, it concerns the administration of justice. The witness speaks in the hearing and under the control of the court, is compelled to speak, with no right to decide what is material or what is immaterial; and he should not be subject to the possibility of an action for his words. This is the view in the courts of England and some of the States,[2] and in our opinion is the correct view. Where

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it is said: "The relevancy of the words complained against to the matter in hand is the test of the privilege." Lewis *v.* Few (5 Johns. 13) is overruled. See Newfield *v.* Copperman, 42 N. Y. Sup. Ct. (10 J. & S.), 302. A witness was asked to fix a date, and said, "Not knowing that a mistress of Mr. Plitt would step in to claim the property, I did not keep an account of the date," is not so wholly foreign to the case as to be beyond the privilege of a witness, and is therefore not actionable. (Hunckel *v.* Voneiff, 69 Md. —; 37 Alb. L. J. 127.)

[1] The State *v.* The Banner Pub. Co. 16 Lea. (Tenn.) 176; and see in note 2, *infra*.

[2] No action lies for words spoken as a witness (Weston *v.* Dobniet, Cro. Jac. 432; Damport *v.* Sympson, Cro. Eliz. 520; Astley *v.* Younge, 2 Burr. 807; Harding *v.* Bulman, Brownl. 2; Terry *v.* Fellows, 21 La. Ann. 375; Keighley *v.* Ball, 4 Fos. & Fin. 799; Seaman *v.* Netherclif, 1 C. P. D. 540; Goffin *v.* Donnelly, 6 Q. B. D. 307), although the words are spoken maliciously and without reasonable or probable cause, and the plaintiff has suffered damage in consequence. (Revis *v.* Smith, 18 C. B. 126; Rex *v.* Skinner, Lofft, 55.) The Code of Miss., 1880, § 1004, does not deprive a witness of this immunity. (Verner *v.* Verner, 64 Miss. 321; 35 Alb. L. J. 460.) A statement, whether written or oral, made by one summoned to attend a court of inquiry instituted by the commander-in-chief of the British army, held to be absolutely privileged, although made maliciously and without reasonable or probable cause. (Dawkins *v.* Rokeby, Law Rep. 8 Q. B. 255; 45 L. J. Q. B. 8.) The witness is not bound to determine the materiality of the evidence, and he may answer, without liability for so doing, questions put to him, and not objected to, or not ruled out by the court. The fact that the testimony is irrelevant, or that the witness is influenced by malice, will not render him liable to an action for slander. (Cal-

the plaintiff brought an action against one L., and the defendant being produced as a witness at the trial, testified that the plaintiff was a common liar, by reason whereof the jury gave the plaintiff but small damages, after verdict for the plaintiff, in an action for slander, it was moved in arrest of judgment that the action did not lie, for, if it did, every witness might be charged upon such a suggestion, and judgment was given for the defendant.[1]

§ 224. A party to a proceeding in a court of justice is not liable to an action for any statement he may make in court in relation to the matter there pending, provided that such statement is made in good faith, believing it to be material,[2] and that it is not calculated to provoke a

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kins *v.* Sumner, 13 Wis. 193; Norden *v.* Oppenheim, 3 Menzies, 42; Seaman *v.* Netherclift, 25 Weekly Rep. 159; 1 C. P. D. 540.) No action will lie against a witness for damage sustained by the falsity of his testimony (Smith *v.* Lewis, 3 Johns. 157; Grove *v.* Brandenburg, 7 Blackf. 234; Cook *v.* Cook, 100 Mass. 194; Cunningham *v.* Brown, 18 Vt. 123; Dunlap *v.* Glidden, 31 Maine, 435; and see Atkinson *v.* Down, 1 Vict. Law Times, 44); as where an action was brought against a witness for swearing that a jewel was worth no more than £180, whereas it was worth £500, a verdict being found for the plaintiff, judgment was arrested. (Damport *v.* Sympson, Cro. Eliz. 520; see cases collected Vin. Abr. Act. on the Case for Deceit; and see Cunningham *v.* Brown, 18 Vt. 123; Dunlap *v.* Glidden, 31 Maine, 435.) No action lies for suborning a witness to testify falsely. (Smith *v.* Lewis, 3 Johns. 157; Bostwick *v.* Lewis, 2 Day, 447.) In slander for charging the plaintiff, in the presence of "sundry persons," with larceny, the defendant pleaded that he spoke the words in giving testimony as a witness in a certain cause. Held, that the defendant might, on the trial, prove what the testimony which he gave was, and that the plaintiff, if he meant to proceed for speaking the words on some other occasion than that named in the plea, should have new assigned. (Nelson *v.* Robe, 6 Blackf. 204.) Justification of words spoken as a witness. (McGovern *v.* McNamara, 13 [6 N. S.] Ir. Jur. 346.)

[1] Harding *v.* Bulman, Brownl. 2 Hutt. 11.

[2] Allen *v.* Crofoot, 2 Wend. 515. No statement in the course of "*judicial proceedings*" which a party may reasonably deem necessary to his cause, will be held libelous, however defamatory it may in its nature be; and it makes no difference with regard to such privileged statements whether they are or not malicious, provided they may be reasonably deemed necessary to the case. (Lea *v.* White, 4 Sneed [Tenn.], 111; Vausse *v.* Lee, 1 Hill [So. Car.], 197; Goslin *v.* Cannon, 1 Harring. 3; Marshall *v.* Gunter, 6 Rich. 419; Warner *v.* Paine, 2 Sandf. 195; Bartlett *v.* Christhilf, 69 Md. ——.) "Judicial proceedings" are not confined to trial of civil actions or indictments, but include every proceeding before a competent court or magistrate in the due course of law, or the administration of justice, which is to result in any determination or action by such court or officer. (Perkins *v.* Mitchell, 31 Barb. 471; and see

breach of the peace.[1] Where the defendant, having made a criminal complaint against the plaintiff, was questioned by him with regard to it during its pendency, and answered, in the presence of the magistrate, that he believed the charge true, held that if the defendant believed in good faith that it was necessary for him to answer the plaintiff, the answer was privileged.[2] So it has been held that if a servant summon his master before a court of conscience for wages, and the latter, in his necessary defense, utter words imputing a felony to the former, no action will lie.[3] Where the prosecutor in an indictment said of one offered as bail for the defendant, in the indictment, "I believe he was mixed up in the fraud," held privileged if spoken in the belief that it was true.[4] And where the plaintiff was a witness on the trial of a cause in which the defendant was a party, on her testifying to a particular fact, the defendant immediately, in open court, exclaimed, "That is a lie, and I can prove it," and soon after added, "and I think I have proved it." For these words the plaintiff brought suit, and it was held no action would lie, the words being uttered "in the progress of a trial, and in the course of justice."[5] Where the plaintiff, in an action for slander, alleged that he took an oath in the King's Bench to bind the defendant to good behavior, and thereupon the defendant falsely and maliciously said, "there is not a word true in that affidavit, and I will prove it by forty witnesses." The jury found the words false and malicious, and for the plaintiff; but judgment was arrested on the ground that

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Stewart *v.* Hall, 83 Kentucky, 375; Ayres *v.* Russell, 20 N. Y. St. Rep. 323.)

[1] Reg. *v.* Hutchins, 7 Ir. L. R. N. S. 426.

[2] Allen *v.* Crofoot, 2 Wend. 515.

[3] Trotman *v.* Dunn, 4 Camp. 211; Lynam *v.* Gowing, 6 L. R. Ir. 259. An action for libelous words spoken or sworn in a court of justice, in a man's own defense, against a charge upon him in that court, will not lie. (Astley *v.* Younge, 2 Burr. 807; 2 Ld. Ken. 536.)

[4] Banbury *v.* Duckworth, 21 Law Times, 302.

[5] Badgley *v.* Hedges, 1 Pennington, 233; but see note 1, p. 343, *post*, also § 171.

what defendant said was in his justification and defense in a legal and judicial way.[1]

§ 224 *a*. A party to a proceeding in a court of justice may ordinarily conduct the prosecution or defense in person or by counsel or attorney.[2] Where he conducts the case in person, whatever he may reasonably believe necessary successfully to maintain his suit or his defense, that he may speak, in the course of the proceeding, without being subject to an action for slander. A party who is not a barrister or counsellor conducting a cause on his own behalf or on behalf of another, has the same privilege as a counsel as to what he may say.[3] The defendant, while advocating his own cause before a referee, and while summing up the cause, called plaintiff, among other things, a perjured scoundrel; in an action for these words, a verdict was taken for the plaintiff; on motion in arrest of judgment the verdict was sustained, and judgment ordered for the plaintiff. The court said that, to arrest the judgment, it must be held that counsel are protected for words spoken by them on the trial of a cause, although they may have been false, and uttered willfully and maliciously, and were irrelevant, and although neither the evidence nor the circumstances afford a suspicion to warrant the accusation. But the court thought the rule could not be carried to that extravagant length.[4] Where a party to a suit was conducting the defense in person, and while cross-examining a witness, upon the witness stating certain facts, exclaimed,

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[1] Boulton *v.* Clapham, W. Jones, 431; Mar. 20, cited by Holroyd, J., in Hodgson *v.* Scarlett, 1 B. & A. 244, and commented upon in Hastings *v.* Lusk, 22 Wend. 410; and see Kean *v.* McLaughlin, 2 S. & R. 470; Perzel *v.* Tousey, 52 Superior Ct. 79.

[2] In New York State, every person of full age and sound mind may appear by attorney . . . in every action . . . by or against him in any court, or may, at his election, prosecute or defend such action in person. (2 R. S. 276, § 11.)

[3] Ring *v.* Wheeler, 7 Cow. 725; Hastings *v.* Lusk, 22 Wend. 410; Perzel *v.* Tousey, 52 Superior Ct. (20 J. & S.) 79; Hoar *v.* Wood, 3 Metc. 193; Morgan *v.* Booth, 13 Bush (Ky.), 480.

[4] Ring *v.* Wheeler, 7 Cow. 725; Hastings *v.* Lusk, 22 Wend. 410.

"It is not so; it's not so; no such thing." In an action for slander by the witness for these words, the jury found they were intended to impute perjury, and the court held them to be actionable.[1]

§ 225. The right which a party to a proceeding in a court of justice, conducting the proceeding in person, has to speak all that he may reasonably believe to be necessary for the successful maintenance of his action or defense, is enjoyed by one conducting a proceeding for another, whether he be conducting it as counsel, attorney, or otherwise. A person was alleged to have kept a sum of money which, by his contract, he ought not to have kept; counsel, in reference to this matter, used the language, "This gentleman has defrauded us," and was interrupted by the court before he had finished his sentence. Held, first, that the words were not actionable; secondly, that they were not irrelevant to the matter before the court.[2] "A counsellor hath a privilege to enforce anything which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false, for a counsellor is at his peril to give in evidence that which his client informs him, being pertinent to the matter in question; but matter not pertinent to the issue or the matter in question he need not deliver, for he is to discern in his discretion

[1] Dedway *v.* Powell, 4 Bush (Ky.), 77; see § 171, and Badgley *v.* Hedges, 1 Pennington, 233.

[2] Needham *v.* Dowling, 15 Law Jour. 9, C. P. An attorney acting as an advocate is privileged as to statements made in the trial of his client's cause, in the same way as counsel. An attorney, in defending his client from a charge of assault in turning out the plaintiff from certain premises in which he had agreed to sell wine under an agreement with J., stated that J. had sufficient reasons for determining the agreement; that he had been plundered by the plaintiff to a frightful extent. Held, a privileged statement. (Mackay *v.* Ford, 5 Hurl. & Nor. 792. See Hollis *v.* Meaux, 69 Cal. 625.) A master is not liable to an action of slander for words spoken while acting as counsel for his slave while the slave is on trial before a competent tribunal, provided the words are material and pertinent to the matter in question. (Shelfer *v.* Gooding, 2 Jones' Law [N.Car.], 175.) As to the privilege of counsel, see Vin. Abr. Act. for Words, B, *a*, 2.

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its the protection is absolute, ective of the motives with which e used. (Perzel *v.* Tousey, erior Ct. [20 J. & S.] 791.) In on over a church controversy, 's attorney filed a newspaper on one of the defendants, and the same in his brief, which d. Held, in the absence of the matter was privileged. t *v.* Hall, 83 Ky. 375.)

ood *v.* Gunston, Sty. 462; *per* In Hodgson *v.* Scarlett, 1 . 232, Lord Ellenborough said . Gunston carried the privilege No action for words spoken nsel to jury, unless malice (Lester *v.* Thurmond, 51 Ga.

ghman, Ch. J., M'Millan *v.* Bin. 178; Maulsby *v.* Reif- Md.), 14 Atl. Rep. 505; Gau- St. Pierre, 7 Leg. News 44). A proctor is not privileged g defamatory statements not to the matter in hand. (Hig- *v.* O'Flaherty, 4 Ir. L. R. N. S.

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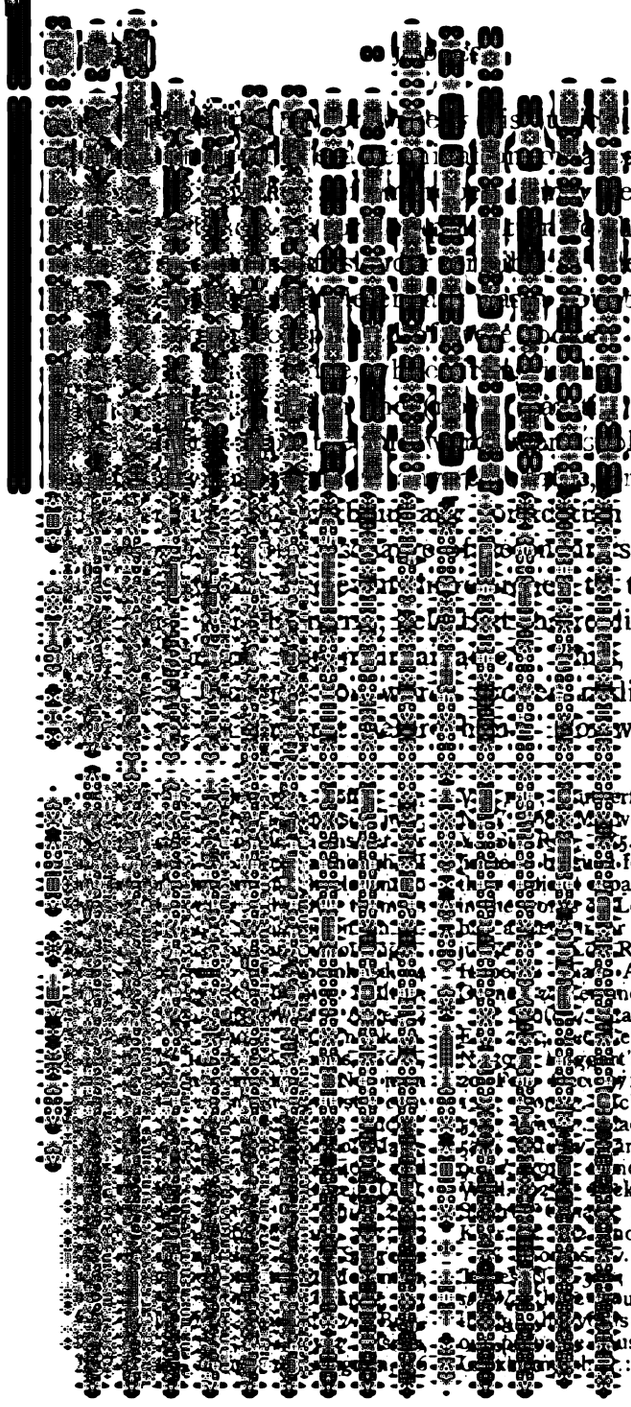
justice; it extends to every occasion upon which one is called upon to defend himself from any charge against him. Thus, words spoken in good faith, and within the scope of his defense, by a party on trial before a church meeting, are privileged, and do not render him liable to an action, although they disparage private character.[1] Where the defendant expressed an opinion founded upon the statements of others that the plaintiff had maliciously killed his (defendant's) horse, for expressing this opinion, the defendant was arraigned *before the church*. In self-defense he produced certificates of the persons upon whose authority he had spoken. For this the plaintiff sued, but, offering no direct proof of malice, it was held the action was not maintainable.[2] So where R. & Co. received a written order for an iron target, which order purported to come from the defendant; R. & Co. sent the target to the defendant, who returned it, stating that he had never ordered it, and requested to see the written order upon which R. & Co. had acted; the order was sent to the defendant, and he wrote R. & Co. that he firmly believed it was written by the plaintiff. It was submitted on behalf of the defendant that the communication was a (conditionally) privileged one. It was left to the jury to say whether the defendant had written that the plaintiff was the author of the order sent to R. & Co. *bona fide* and without malice, believing his statement to be true; the jury found in the affirmative, a verdict was entered for plaintiff, with £5 damages, with leave to the defendant to move to enter the verdict for him, and on motion the verdict was entered for the defendant.[3]

§ 227. No action for slander or libel can be maintained against a judge, or one exercising judicial functions, for

[1] York *v.* Pease, 2 Gray (Mass.), 282.

[2] Dunn *v.* Winters, 2 Humph 512.

[3] Croft *v.* Stevens, 7 Hurl. & N. 570; see *post*, § 240.



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of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.[1] No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.[2] No action will lie for defamatory matter contained in a presentment of a

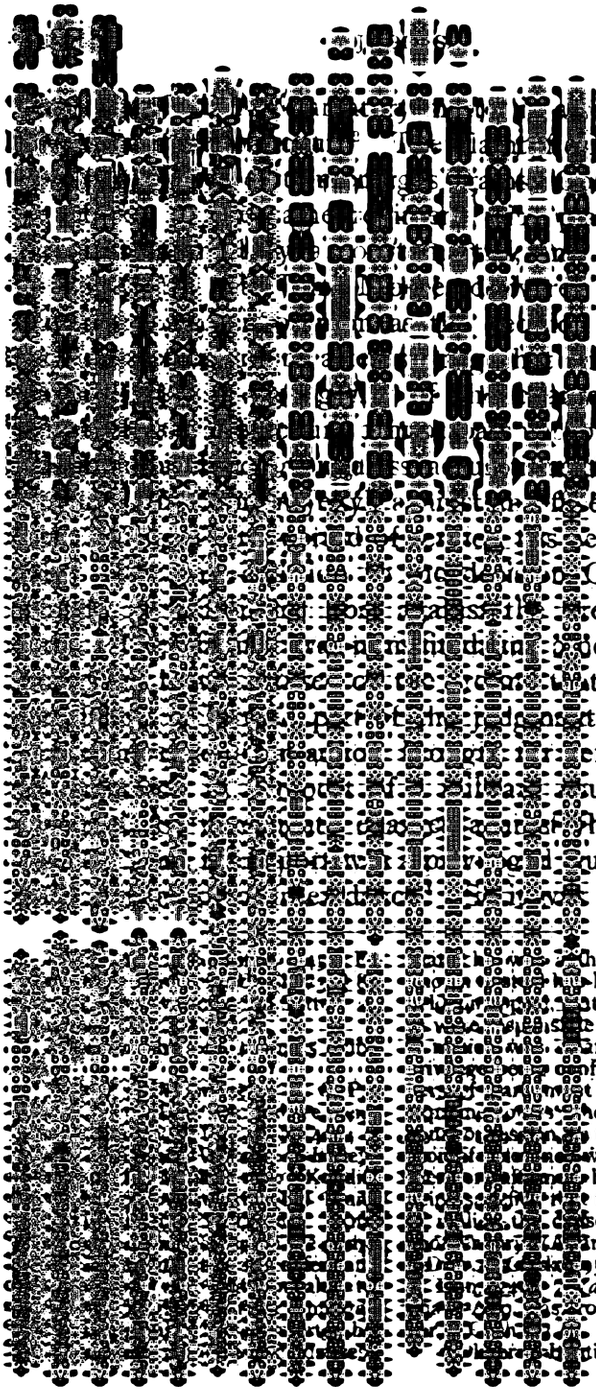
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to lay down the broad proposition that in no case is a judge liable for words uttered by him as a judge." "A public officer, who is not a mere volunteer, but compelled to act in a judicial capacity, is not amenable, either civilly or criminally, for a mistake in law or error of judgment, when his motives are untainted with fraud or malice." (Teall *v.* Felton, 1 N. Y. 547.) And see a case against physicians for giving a certificate of insanity. (Ayres *v.* Russell, 57 Hun, 282.)

Words spoken in discharge of official duty are not actionable. (Goodenow *v.* Tappan, 1 Ham. 60.) *Aliter*, if spoken under pretense of official duty, wantonly and with malice. The question of intention is to be left with the jury. (*Id.*) Thus, in an action against the defendant, a ward beadle, for words spoken by him before an inquest, but not in answer to any inquiries of the jury nor in the presence of the jury only, held that it was a question for the jury whether the words were spoken by the defendant in the discharge of his official duty. (Wilson *v* Collins, 5 C. & P. 373.) In an action for libel against one, a justice of the peace, for defamatory matter contained in an official certificate by him to the grand jury, held the publication was conditionally privileged. (Sands *v.* Robison, 12 S. & M. 704.) Words spoken by a grand juror in the course of his duty as a juryman, are privileged. (Little *v.* Pomeroy, Ir. Rep. 7 Com. Law, 50.) A report of the grand jury, under any part of § 2992 of the Code of Iowa, held not a privileged communication; but where it was made in good faith, and in the discharge of a supposed public duty, it does not furnish ground to sustain an action for libel. (Rector *v.* Smith, 11 Iowa [3 With.], 302.) What a petit juror says in the jury-room concerning a matter before the jury (Dunham *v.* Powers, 42 Vt. 1), or during the trial, is absolutely privileged. (Rex *v.* Skinner, Lofft, 55.)

[1] Rochester White Lead Co. *v.* The City of Rochester, 3 N. Y. 466. See Cooke on Defam. 63; 1 Bish. Cr. Law, §§ 914, 916, 3d ed.; Scovil *v.* Geddings, 7 Ohio, 211.

[2] Weaver *v.* Devendorf, 3 Denio, 117; Vail *v.* Owen, 19 Barb. 22; Brown *v.* Smith, 24 *Id.* 419; and see Hill *v.* Sellick, 21 Barb. 207; Harman *v.* Brotherson, 1 Denio, 537. But an officer who violates a ministerial duty, though his office is primarily judicial, is liable therefor. (Wilson *v.* Mayor of New York, 1 Denio, 595; Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 463.) See Everts *v.* Kiehl, 102 N. Y. 296, action against justice of the peace for failing to render a decision in a cause tried before him. Words spoken by the mayor of a city are privileged. (Rector *v.* Smith, 11 Iowa, 302.)



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defendant, being governor in council of Fort St. George, was justified in publishing, according to the fact, that the court of directors had resolved to dismiss the plaintiff from the service for a gross violation of the trust reposed in him as commanding officer of the Molucca Islands, and that he [the defendant] had been ordered to erase his name from the army list.[1]

§ 228. With regard to the right of a judicial officer, we suppose a difference exists between a judge of a court of record and a judge of a court not of record, or one who is not, indeed, a judge in the strict sense of the term, but who merely executes judicial functions; as respects the first, his being a judge, without more, constitutes a complete defense to an action for anything said or written by him as such judge (§ 227); but as respects the second, the privilege arises only in cases in which he had jurisdiction.[2] "If magistrates while occupying the bench, under pretense of *giving advice*, publicly hear slanderous complaints over which they have no jurisdiction, although their names may be in the commission of the peace, a report of what passed before them is as little privileged as if they were illiterate mechanics in an ale-house."[3]

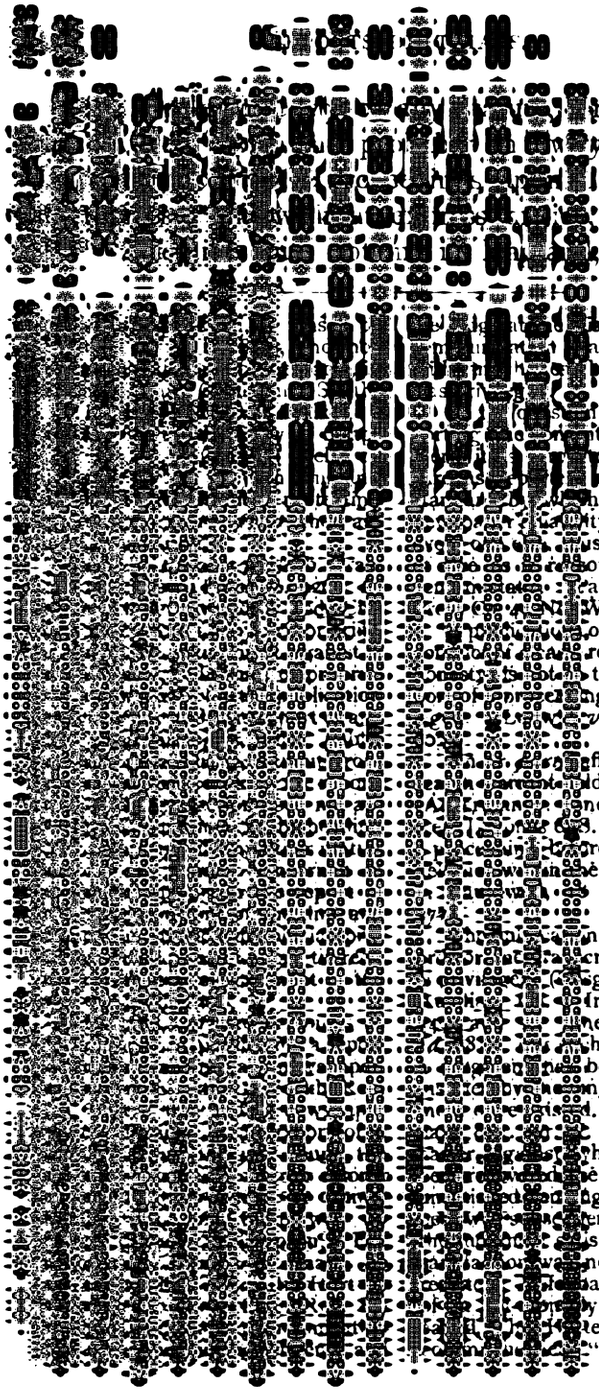
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see Dawkins *v.* Ld. Paulet, Law Rep. 5 Q. B. 94. This case was not followed in Maurice *v.* Worden, 54 Md. 233.

[1] Home *v.* Bentinck, 4 Moore, 563; 8 Price, 226; and Anderson *v.* Hamilton, 8 Price, 244, note; Stace *v.* Griffith, 20 Law Times, N. S. 197; Law Rep. 2 Priv. C. C. 420. A communication to a governor respecting an officer under his command is *quasi* judicial, and privileged. (Gray *v.* Pentland, 2 S. & R. 23; 4 S. & R. 420.) The question as to whether an officer is justified in animadverting upon the conduct of a soldier under his command, is a question of a military character to be decided by the military authorities, and one in relation to which the courts of law ought not to interfere. (Holbrow *v.* Cotton, 9 Quebec L. R. 105.) See § 377*a*, *post*.

[2] Estopinal *v.* Peroux, 37 La. Ann. 477.

[3] Campbell, Ch. J., Lewis *v.* Levy, 1 El. B. & E. 537; 36 Law Jour. Rep. 282 Q. B.; and see, as to necessity of tribunal having jurisdiction, Hosmer *v.* Loveland, 19 Barb. 111; Howard *v.* Thompson, 21 Wend. 319; King *v.* Root, 4 Wend. 113; O'Donaghue *v.* McGovern, 23 Wend. 26; Hastings *v.* Lusk, 22 Wend. 410; Fawcett *v.* Charles, 13 Wend. 473; Harrison *v.* Bush, 5 Ell. & Bl. 344; Milam *v.* Burnsides, 1 Brev. 295; Maloney *v.* Bartley, 3 Camp. 210; McGregor *v.* Thwaites, 3 B. & C. 24. A magistrate



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there and in New York some limitations are imposed upon the rule, it is necessary, in order to show in what these limitations consist, to examine somewhat in detail the authorities upon the subject. The initial principle seems to be that the public good requires that the proceedings in courts of justice should be conducted openly. Accordingly it is in New York provided by statute that "the sittings of every court within this State shall be public, and every citizen may freely attend the same."[1] Although there is no such law in England, it is the custom there to hold the courts with open doors.[2] And it is said to be a rule of law that "every one is supposed or presumed to be cognizant of the proceedings in the courts of justice,"[3] and hence "it is of great consequence that the public should know what takes place in the courts."[4] A publication of the proceedings of a court "only extends

peared a list of judgments in which the name of plaintiff, with the judgment against him, was inserted. Plaintiff brought action for libel, alleging by innuendo that the insertion of his name in that column implied that the judgment remained unsatisfied, and that he was unworthy of credit. Defendants denied the innuendo. Held that the publication was capable of being defamatory, and the jury found a verdict for the plaintiff. On appeal, held that the meaning of the allegation was properly left for the jury, and that the jury having found such to be its meaning, together with the fact that the statement was not true, the statement as published was a libel. (Williams *v.* Smith, 22 Q. B. D. 134; 39 Alb. L. J. 247.) A judgment was recovered against C. E. Woodruff. Defendant by mistake published that it had been recovered against plaintiff, C. T. Woodruff. Held, C. T. Woodruff could not recover unless upon proof of special damages. (Woodruff *v.* The Bradstreet Co. 35 Hun, 16.) See note 3, p. 242, *ante*.

[1] 2 Rev. Stat. 274, § 1. "No law insures the publicity of the courts of justice, either in England or the United States." (Lieber on Civil Liberty, 134, ed. of 1859.)

[2] The Divorce Act (20 & 21 Vict. ch. 85) provides for hearing certain cases in private, and (11 & 12 Vict. ch. 42) permits justices of the peace to hear certain cases in private. In Andrews *v.* Raeburn, 9 Ch. App. 522, it was held that no hearing of a cause in the High Court of Justice would be had unless by consent of both parties, except where lunatics or wards of court were concerned. In Nagle-Gillman *v.* Christopher, 4 Ch. Div. 173, held there was no power to hear cases in private, even by consent, except where lunatics and wards were concerned, and cases where the whole object of the suit would be defeated by a public trial. By 11 & 12 Vict. ch. 43, places where proceedings of a summary character are carried on shall be deemed an open court.

[3] Willard's Eq. Juris. 251.

[4] Campbell, Ch. J., Hearne *v.* Stowell, 12 Adol. & El. 719; 4 Per. & D. 696.

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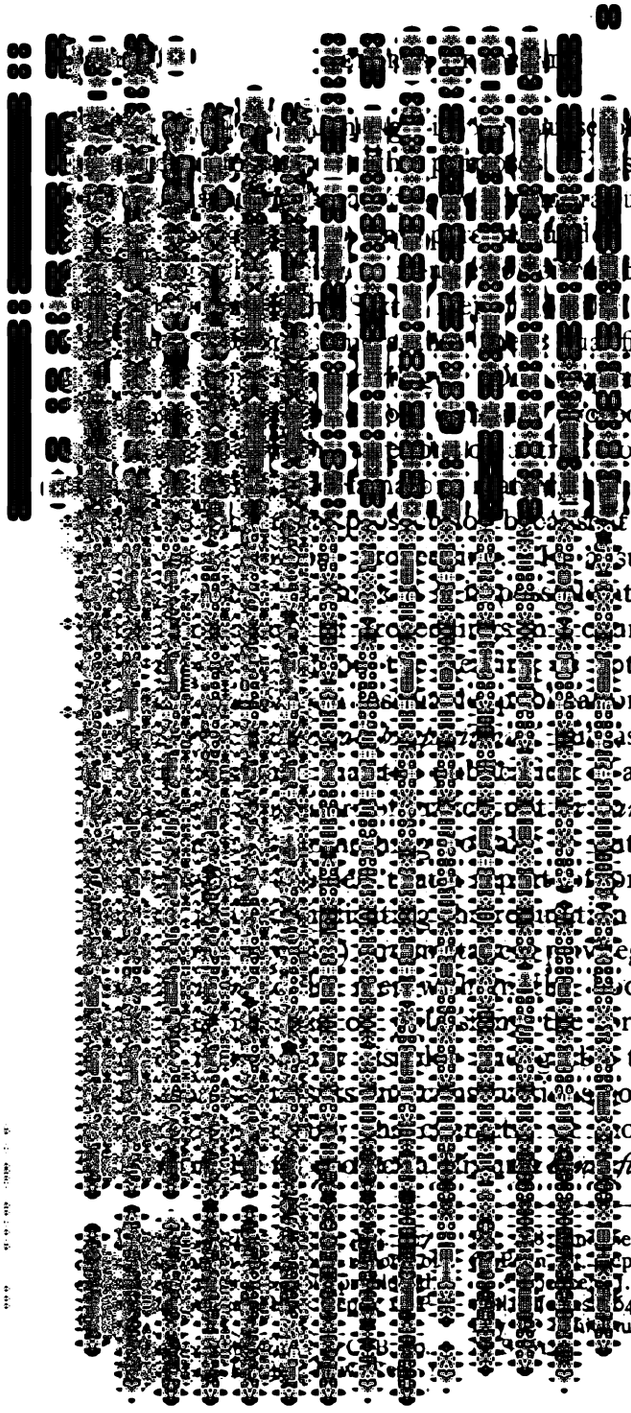
court to consider whether it was lawful to publish it."[1] To entitle a publication to the privilege of § 1907, Code of N. Y. Civ. Pro., as a fair and true report of a judicial proceeding, the publication must be fair and not garbled so as to produce misrepresentations, and must not, by suppression of some portion of the proceedings, leave a false or unjust impression. It need not be a verbatim report, nor embrace the entire proceedings, but may consist of condensed or abridged statements thereof.[2] "Matters may appear in a court of justice that may have so immoral a tendency, or be so injurious to the character of an individual that their publication would not be tolerated."[3] And therefore it is said, "There is no privilege when the subject-matter is *blasphemous* or *defamatory of an individual*."[4] Thus where on the trial of Carlile for publishing Paine's Age of Reason, the defendant read the whole of the book to the jury, and afterwards his wife published a full report of the trial, containing an entire copy of the Age of Reason as read to the jury; for this publication a criminal information was granted against Mrs. Carlile, the court observing that, although as a general proposition it was certainly lawful to publish the proceedings of courts of justice, yet it must be taken with this qualification, that what is contained in the publication must neither be *defamatory of an individual*, tending to excite disaffection, nor calculated to offend the morals

[1] Littledale, J., Flint *v.* Pike, 4 B. & C. 473; 1 Starkie on Slander, 263.

[2] Salisbury *v.* Union & Advertiser Co. 45 Hun, 120. In this case it was also held that the heading of a publication may be privileged, even though not necessarily purporting to be part of a judicial proceeding, and although it does not necessarily appear that it was so in fact, as where it consists of a question which, if standing alone, might be construed as libelous, but which, when taken with what follows, appears to be a question presented by its proceeding. In Campbell *v.* Press Pub. Co. MS., Kings County Circuit, New York, June, 1885, it was held by Bartlett, J., that the publication in a newspaper of a complaint made before a police sergeant at a police station-house, was privileged by § 1907 of New York Code of Civil Procedure.

[3] Maule, J., Hoare *v.* Silverlock, 9 C. B. 20.

[4] 1 Starkie on Slander, 263.



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[3] See Pittock *v.* O'Neill, p. 253.

[4] J., Thomas *v.* Cross- 64; and see Rish Allah urst, 18 Law Times,

the proceedings in a court of justice,[1] and perhaps the result of the authorities is, that a fair report of a trial or a proceeding in a court of justice, conducted publicly in the presence of the parties concerned, is conditionally privileged.[2]

§ 230. When it is said that a fair report of a trial in a court of justice is privileged, what is meant by a fair report? In one case it is said: "*If* a party is to be allowed to publish what passes in a court of justice, he must publish *the whole case*, and not merely state the conclusion which he himself draws from the evidence,"[3] and where in a report of proceedings under a commission of lunacy, it was stated, "The plaintiff's testimony, being unsupported, failed to have any effect upon the jury. . . Mr. Jervis commented with cutting severity on the testimony of Mr. O.," the statement was held not privileged, and it was said that the proceedings themselves ought to have been set out, not merely the result of them.[4] Yet again it has been

[1] Ryalls *v.* Leader, Law Rep. 1 Ex. 298.

[2] A fair account of what takes place in a court of justice is privileged. (Hearne *v.* Stowell, 12 Adol. & El. 718; 4 Per. & D. 696; Turner *v.* Pullman, 6 Law Times Rep. N. S. 130; Rex *v.* Wright, 8 T. R. 298; Chalmers *v.* Payne, 2 C. M. & R. 156; Cincinnati, &c. Co. *v.* Timberlake, 10 Ohio St. 548; Flint *v.* Pike, 4 B. & C. 84; Saunders *v.* Mills, 6 Bing. 213; 3 M. & P. 520; Lewis *v.* Levy, 1 El. B. & E. 537; Andrews *v.* Chapman, 3 C. & K. 286; Smith *v.* Scott, 2 C. & K. 580.)

[3] Abbott, Ch. J., Lewis *v.* Walter, 4 B. & Ald. 612. See *ante*, § 229.

[4] Roberts *v.* Brown, 10 Bing. 519; 4 M. & Sc. 407; and see Delegal *v.* Highley, 3 Bing. N. C. 950. Where the matter complained against professed to be a report of proceedings in a court of justice, did not profess to state facts as deposed to by the witness, but only as stated by the counsel for the prosecution—held not to be a fair report, and not privileged. (Saunders *v.* Mills, 6 Bing. 213; 3 M. & P. 520.) And where the report stated that the evidence before the magistrate entirely negatived the story of the plaintiff, which story was the statement of the plaintiff in which the imputed perjury was contained—held not to be privileged; and a plea justifying this report on the ground that it was a fair and correct report of the proceedings which had taken place, was held bad after verdict. (Lewis *v.* Levy, 1 Ellis, B. & E. 537.) The editor of a newspaper has the right to publish the fact that an individual has been arrested, and upon what charge, but he has no right while the charge is in the course of investigation before the magistrate, to assume that the person accused is guilty, or to hold him out to the world as such. (Usher *v.* Severance, 20 Maine, 9; see Woodgate *v.* Ridout, 4 Fost. & F. 202; Kane *v.* Mulvany, 2 Ir. Com. Law R. 402.)

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policeman,"[1] or "Horse stealing,"[2] it was held not to be privileged. Where a statement defamatory of the plaintiff was copied from a previous publication, and published by the defendant, prefaced by the word "Fudge," the court left it to the jury to say whether that word was added to vindicate the character of the plaintiff, or merely to create an argument in favor of the defendant, in case proceedings should be taken against him for the publication.[3] In another case the report was headed "Willful and corrupt perjury," and it was said by the court, "That (the heading) is merely stating the charge. It may be a heading entirely innocent, simply indicating what is to follow, and it would be a question for the jury whether it is a fair and *bona fide* report of the proceedings."[4] A report of a judicial pro-

[1] Edsall *v.* Brooks, 17 Abb. Pr. R. 221; 2 Robertson, 29; or Blackmailer, Healey *v.* Dettra, 8 Atl. Rep. 622; Robertson *v.* Bennett, 44 Superior Court (12 J. & S.), 66.

[2] Mountney *v.* Watton, 2 B. &. Ad. 673.

[3] Hunt *v.* Algar, 6 C. & P. 245. Where the complaint was that the complainant had probable cause to suspect, and did suspect, that letters written to him, and his property, and also a check payable to his order, had been feloniously taken from his safe by A., at the instigation of B., a report which stated that the complainant alleged that important letters and a check had been taken from his safe by A. (plaintiff) at the instance of B., that B. was arrested *and the letters found in his possession*—the part in italic was untrue, but the report was held to be a fair one. (Ackerman *v.* Jones, 37 Sup. Ct. [5 Jones & Sp.] 42.)

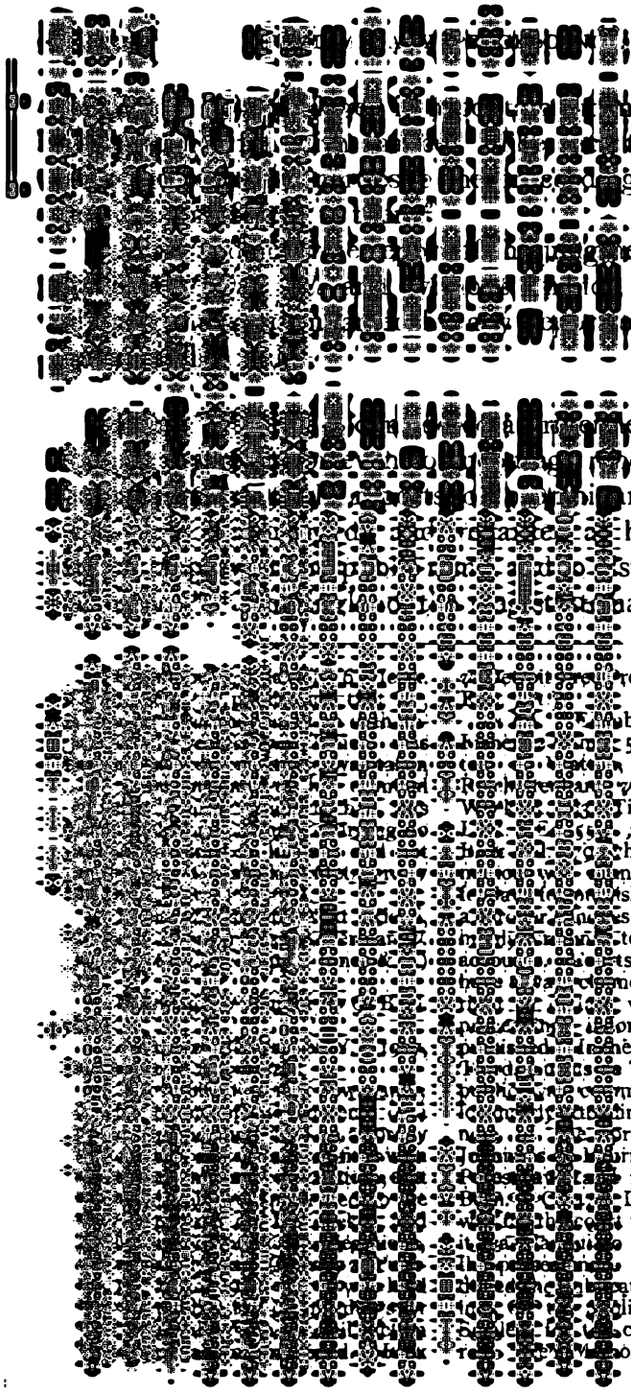
[4] Lewis *v.* Levy, 1 Ell. B. & E. 537. In Barber *v.* Bennett, MS., the report of a proceeding before a magistrate was headed "Suspicion of stealing money." The defense was a fair report, and on demurrer the Superior Court of New York held that the heading did not prevent the report being a privileged publication. So held where the head line was "*Imported Repeaters; Three Gangs Arrested. Confession of one of the Captives.*" Hodges *v.* Abell, Publishers of the Baltimore Sun, April 21, 1888. Plaintiff, together with several others, was arrested on a charge of being suspicious characters. It was believed that they had come to Baltimore to vote illegally. One of the men arrested made a confession to that effect. The men were held until the day after the election, when they were discharged, no further evidence having been obtained.

The Sun published an account of the arrests, giving the statement of Hodges, the report being headed, "Imported Repeaters; Three Gangs Arrested. Confession of one of the Captives."

Plaintiff claimed that the heading was libelous because it stigmatized Hodges as a repeater. The Sun claimed that the heading simply indicated the purport of the article, and was not intended as a statement of an independent fact.

The court held that the heading was privileged if it was a fair comment on the body of the report.

It should be left to the jury to find if the publication is a fair report. (Ashmore *v.* Borthwick, 49 J. P. 792.)



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L. Peacock, and Fraser's Magazine, No. 342, 361.) So recently as 1867, a justice of the Superior Court of the city of New York, prohibited the publication of proceedings had before him, and his course was approved by the other justices of that court. A coroner may prohibit the publication of proceedings had before him (Garnett *v.* Ferrand, 6 B. & C. 611), and so may a committing magistrate. (Cox *v.* Coleridge, 1 B. & C. 37; see Borthwick on Libel, 119, 121 note; Holt on Libel, ch. 9.) The cases are more numerous where the publication of the proceedings has been prohibited pending the proceedings. A disregard of such a prohibition is a contempt. In one case, Lord Eldon remarked that when he first came into Westminster Hall, the law was well understood that it would be a contempt to publish the proceedings of the court before they were finished. (Knight *v.* Knight, 1 Jac. & Walk. 167.) In Rex *v.* Clement, 4 Barn. & Ald. 218, Lord Tenterden ordered that there should be no publication of the proceedings until the several indictments against the defendant had been tried; and he fined a newspaper proprietor £500 for disobedience of this order, in publishing an account of the first trial before the second had begun. The courts upheld the action of Lord Tenterden. Lord Campbell, in his Lives of the Chief Justices, vol. 3, p. 208, gives it as his opinion, that this transaction tarnished the fame of Lord Tenterden, and that the order forbidding the publication was "imprudently" made. (See Rex *v.* Gilham, M. & M. 165; Brook *v.* Evans, 6 Jur. N. S. 1025; Felkin *v.* Ld. Herbert, 10 Jurist, N. S. 62.) In New York, by statute (2 Rev. Stat. 278, § 10), "Publishing a false or grossly inaccurate report of the proceedings of a court of record is a criminal contempt." Any publication prejudicing the merits of a cause before it is heard is a contempt. (2 Atk. 479.) The validity of plaintiff's marriage coming in question in a suit, her father, pending the suit, advertised in a newspaper, offered a reward to any one who would produce legal proof of the marriage—held a contempt. (Pool *v.* Sacheverel, 1 P. Wms. 676; and see Brodribb *v.* Brodribb, 3 Pro. Div. 66; Butler *v.* Butler, 13 *Id.* 73.) The printers of a newspaper were committed for publishing that certain parties to a suit had turned "affidavit men." (Roach *v.* Garvan, 2 Atk. 469; 2 Dick. 794.) In that case reference was made to the case of a printer of a newspaper punished for publishing of a certain cause, that it was "a hue and cry after charitable uses," and to the case of Capt. Perry, punished for printing and publishing his brief before the cause came on. A party was committed to prison for publishing an advertisement reflecting on an answer in the cause. (See Cann *v.* Cann, 2 Dick. 795; *Ex parte* Crow, 2 Turn. & Ven. Pra. 231, 232.) Where an injunction order appointing a receiver had been granted, the party obtaining the order caused printed copies of it to be dispersed among the tenants, to prevent them paying rents except to the receiver; Lord Hardwicke refused to adjudge it a contempt, but expressed his disapproval of the proceeding (Baker *v.* Hart, 2 Atk. 488), as thus: "Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before the cause is finally heard. It has always been my opinion, as well as the opinion of those who have sat here before me, that such a proceeding ought to be discountenanced." Repeated by Sir W. Page Wood, V. C., Tichborne *v.* Mostyn, Law Rep. 7 Eq. 55, *n.*; and see Daw *v.* Eley, Law Rep. 7 Eq. 49, in which case the solicitor in the cause had published a letter in a newspaper relating to the pending suit; on a motion to punish

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the publication of preliminary inquiries before magistrates is invariably lawful, nor are we prepared to say that the

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ordered the clergy not to recognize the jurisdiction of the secular tribunals. (Forsyth on Trial by Jury, 367.)

Writing a letter to a judge that his decision was unjust, and that he endeavored to conceal the facts from the appellate court, held not to be a contempt but a misdemeanor. (*Re* Griffin, 15 N. Y. St. Rep. 400.) Such a letter is not privileged by being marked private. (Kitcat *v.* Sharp, 48 Law Times, N. S. 64; see Reg. *v.* Faulkner, 2 Mont. & Ayr. 321.)

In West Virginia a statute limiting the power of courts to punish for contempts was held to be unconstitutional. (*Re* Frew, 19 Cent. Law Jour. 71; and note, *Id.* 32; and see Story *v.* The People. 79 Ill. 45; Morrell's Case, 16 Ark. 384.) On the other hand such statutes have been held valid and constitutional by the courts of North Carolina, 65 N. Car. 353; Iowa, 6 Iowa, 245; Tennessee, 5 Cold. 221; Florida, 11 Fla. 174; Mississippi, 4 S. & M. 751; Illinois, 3 Scammon, 395; California, 42 Cal. 412; New York, 5 Hun, 317; 101 N. Y. 245; Pennsylvania, 1 Grant's Cases, 353; Connecticut, Middlebrook's Cases, 113 Conn.; the United States, 1 Kent's Com. 301; 1 Wall. Jr. 1, and 12 Am. Dec. 180, note; and Virginia, 4 Leigh, 685.

Abusing the opposing attorney (*Re* Johnson, 20 Q. B. D. 68), or parties or witnesses (Smith *v.* Lakeman, 26 L. J. Ch. 305; Shaw *v.* Shaw, 2 Sw. & Tr. 515; *Re* Mulock, 10 Jur. N. S. 1188), or any officer of the court. (Price *v.* Hutchinson, L. R. 9 Eq. 534.)

A libel on a grand jury in relation to an act already done, and not calculated directly to obstruct or embarrass the future performance of their duty is not summarily punishable as a contempt of court. (Story *v.* People, 79 Ill. 45.) It is lawful, with decency and candor, to discuss the propriety of a verdict. (Rex *v.* White, 1 Camp. 359.) Publishing disparaging comments upon the court, or its officers, or its proceedings, is a contempt. Thus, the New York Common Council, being enjoined by a preliminary injunction from certain official action, passed resolutions declaring the injunction illegal, proclaiming a resolution to disregard it, and imputing dishonesty to the judge who granted it; held, the resolution was a contempt. (The People *v.* Compton, 1 Duer, 512; affi'd, The People *v.* Sturtevant, 9 N. Y. 263; and see Morrison *v.* Moat, 4 Edw. 25.) And where an officer of a corporation had a verdict against him in an action for malicious prosecution, which verdict was sustained by the court, the corporation voted him a sum of money, and passed a resolution to the effect that in instituting the prosecution in question he had been actuated by motives of public justice, this was held a reflection upon the court, and a contempt. (Rex *v.* Watson, 2 Term R. 199.) Pending the trial of one Nixon, in the Oyer and Terminer, New York city, April, 1864, an article appeared in the New York Tribune, headed, "A judicial outrage," and which was supposed to reflect upon the conduct of the judge (G. G. Barnard) presiding on the trial of Nixon. The article was supposed to have been written by Horace Greeley, and an order issued for him to show cause before Judge Barnard why he should not be attached for contempt. Instead of showing cause he moved for a writ of prohibition, which being denied, the following order was made:

"*In the matter of Horace Greeley upon an Order to show Cause why he should not Answer for a Contempt of Court.*—It is ordered by the court, that the said Horace Greeley, now here appearing, by I. T. Williams, Esq., his counsel, answer (and the answer under oath is waived) the following interrogations, and have until Monday next, being the 25th day of April inst., at 11 o'clock A. M., to file answers thereto, and be then heard in this court in defense of the accusation that he published a grossly inaccurate report of the

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Id. 9; *Re* Yates, 4
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d. 43; *Ex parte* Jones,
Re Crawford, 18 Law
13 Jur. 955; *Ex parte*
D. & G. 523; Daw *v.*
7 Eq. 49; Chelten-
8 *Id.* 580; Tichborne
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Birch *v.* Walsh, 10 Ir.
v. Lee, 5 Esp. 123;
Camp. 359; 1 Hawk.
Re Crawford, 13 Q. B.
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ecisions the privilege extends to *ex parte* proceedings. Certainly it is so in the State of New York,[1] in Maryland,[2] nd in England.[3] There is no distinction between one ourt and another as respects the right of publishing reports of their proceedings, provided the proceedings be had publicly, and not *ex parte*.[4] And where a preliminary examination is publicly conducted, in the presence of the accused, here seems to be no reason why the same rule should not apply to such a proceeding, as to a trial. It has been said no privilege can be claimed for a report of an *ex parte* proceeding,[5] but probably it is now settled that a fair re-

People *v.* Few, 2 Johns. 290; 2 Stark. Slander, ch. xiii; *Re* Courtney, 6 The Reporter, 474; McCormick *v.* Sheridan, 20 Pac. Rep. 24; Watson *v.* The People, 16 *Id.* 329: *Re* Cary, 10 Fed. Rep. 629: *Re* Ferry, 128 U. S. 189; Solicitor's Journal, 1864, p. 142; An Inquiry into the Doctrine lately Propagated concerning Attachments for Contempts, &c., by an English Constitution Crown Lawyer, London, 1769. (Historical Soc. Lib. N. Y.) See a pamphlet entitled Rights of Corporations and Reporters, published at Columbia, South Carolina, A. D. 1857, containing the report of the case of Robert W. Gibbs *v.* Edward I. Arthur and John Burdell. The city council held, in 1855, a public meeting. The plaintiff, the editor of one of the city papers, being present, was asked by the mayor whether he had come to take notes of the proceedings. The plaintiff answering in the affirmative, the mayor ordered him to leave, which on the plaintiff's refusing to do, he was, on the mayor's orders, ejected by a police officer. The plaintiff sued the mayor and the officer, and the defense interposed was, in the first instance, that the mayor acted on a resolution of the city council forbidding the presence of reporters at their meetings, and subsequently the defense was set up that the city council had authorized the publication of their proceedings in a paper other than that with which the plaintiff was connected. Both these defenses failed, and the plaintiff recovered damages for being ejected.

[1] Salisbury *v.* Union & Adv. Co. 9 N. Y. St. Rep. 465; see *ante*, note to § 329.

[2] McBee *v.* Fulton, 47 Md. 403.

[3] Three men complained *ex parte* to a magistrate respecting plaintiff; the magistrate denied their application on the ground that the remedy was by a civil not a criminal procedure. Defendant published a report of this application, which the jury found to be a true report, and it was held to be a privileged publication. (Usill *v.* Hales, 3 C. P. D. 319.) Publication of a statement made by a justice of what had been said by persons applying to him for a warrant, such statement not appearing in any affidavit, nor were made as part of a hearing, held not privileged. (McDermott *v.* Ev. Jour. Assn. 14 Vroom [N. J.], 488; 15 *Id.* 430.) Statement made after proceeding terminated not privileged. (Curtis *v.* Perkins, 66 Barb. 610; Lyman *v.* Gowing, 6 L. R. Ir. Q. B. 259.)

[4] Lewis *v.* Levy, 36 Law Jour. R. Q. B. 282; 1 El. B. & E. 537.

[5] Publishing the contents of an *ex parte* affidavit, made to obtain the plaintiff's arrest, is not privileged as a report of judicial proceedings. (Cincinnati, &c. Co. *v.* Timberlake, 10 Ohio St. 548.) Report of *ex parte* preliminary proceedings not privileged. (Duncan *v.* Thwaites, 3 B. & C 556: 5 D. & R. 447; Rex *v.* Lee, 5 Esp. 123; Curry *v.* Walter, 1 B. & P.

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Lords is a public court; a report of their proceedings is privileged,[1] and so is a report of testimony taken before an investigating committee of Congress.[2] A report of the proceedings before a grand jury was held not to be privileged.[3] The register of protests of bills and notes in Scotland, established by statute, was held a public document, to which every one had a right of access, and the publication of which was privileged.[4] Where one who had been convicted of murder and sentenced to death, while on the scaffold, and just before his execution, made a speech, in which he reflected upon one of the counsel who defended him on his trial, it was held that a report of this speech, published in New York by the defendant, in a newspaper of which he was editor, was not privileged either at common law or by the statute.[5]

§ 232. Where the judicial proceeding is public, and not *ex parte*, the report of what takes place is not the less privileged because published pending the proceeding, and before it has terminated; thus where a declaration for libel set out, in three separate counts, reports of three separate days' proceedings, respectively (on two adjourn-

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whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected."

[1] Kane *v.* Mulvany, 2 Ir. Com. Law, 402.

[2] Terry *v.* Fellows, 21 La. An. 375.

[3] McCabe *v.* Cauldwell, 18 Abb. Pr. R. 377. As to report of a coroner's inquest, see East *v.* Chapman, M. & M. 46. The publication of a report of commissioners appointed to inquire into corporations, held not to be privileged. (Charlton *v.* Walton, 6 C. & P. 385.) A statement in a printed sheet issued by the police commissioners, to members of the force, to the effect that plaintiff had been dismissed from his situation under said commissioners, as inspector of hackney carriages, for fraud in his accounts, held not privileged. (Jackson *v.* Mayne, 19 Law Times, N. S. 399.) A publication of a report of an inspector of charities, under the charitable trust act, held not to be privileged. (Cox *v.* Feeney, 4 Fost. & F. 13.)

[4] Fleming *v.* Newton, 1 Ho. of L. Cas. 363. See *ante*, note 1, p. 351.

[5] Sanford *v.* Bennett, 24 N. Y. 20. See statute referred to in note to § 229, *ante*. If a highwayman shall at the gallows arraign the justice of the law, and of those who condemned him, he who publishes (the highwayman's language) shall not go unpunished. (4 Read. Stat. Law, 154; Dig. LL, 32).

ments), before a magistrate; the report of the first day stating that the plaintiff was charged with perjury, and an adjournment, but reserving the report; the report of the second day also stating an adjournment in language intimating that there would be a report of the proceedings of the day to which the adjournment was; and the third stating the discharge of the party charged; and the jury found generally that the reports were fair and correct—held, that the reports of the first two meetings did not lose the privilege by reason of the proceedings there reported not being final.[1] And in the same case, if we correctly interpret the report, it was held that the privilege of publishing a report of preliminary proceedings is not lost by the fact that the proceeding terminates in the discharge by the magistrate of the party accused.

§ 233. By becoming a member of a church the individual tacitly consents to submit to the church discipline.[2] The proceedings of the church to enforce its discipline are *quasi judicial*, and therefore those who complain, or give testimony, or act, or vote, or pronounce the result, orally or in writing, acting in good faith and within the scope of the authority conferred by this jurisdiction, and not falsely or colorably making such proceedings a pretense for covering an intended scandal, are protected by law.[3] One

[1] Lewis *v.* Levy, 1 El. B. & E. 537. See Usill *v.* Hales, 3 C. P. D. 319.

[2] Remington *v.* Congdon, 2 Pick. 310; Jarvis *v.* Hathaway, 3 Johns. 180; Holt on Libel, 236; Shelton *v.* Nance, 7 B. Monr. 128; Whitaker *v.* Carter, 4 Ired. 461; see Brit. Quar. Rev. October, 1876, art. Amer. Eccl. Law. Plaintiff and defendant were members of a county association of congregational ministers. At instance of defendant the association adopted resolutions implying that plaintiff had been guilty of certain offenses named, withdrawing fellowship from him temporarily, inviting him to appear and show cause why he should not be dismissed, and directing that the resolution be published in certain papers, which publication was made. Held, that the publication was conditionally privileged. (Shurtleff *v.* Stevens, 51 Vt. 501.) A defamatory communication by a rector to his curate, for the purpose of obtaining his advice as to an ecclesiastical matter, is conditionally privileged. (Clark *v.* Molyneux, 3 Q. B. D. 237.) A priest's advice to a parishioner to avoid a certain place where conversation contemning his religion is indulged in, held conditionally privileged, although special damage alleged. (Messire Blanchard and Richard, Ramsay's App. Cas. 421.)

[3] Farnsworth *v.* Storrs, 5 Cush.

Miss Mary Jerom was the daughter of Quaker parents, and she was educated in that persuasion. She having acted in disobedience to the rules of the congregation, by frequenting places of public diversion and otherwise, she was warned to discontinue such practices, whereupon she absented herself from *the meetings*, and declared that she no longer regarded herself as one of their body. After various fruitless attempts to reclaim her, the society proceeded in the usual way to a sentence of expulsion, which was reduced to writing, approved at a monthly meeting, and read by the defendant Hart, as clerk of the meeting, at a subsequent meeting for worship. This sentence of expulsion recited that the prosecutrix was born of Quaker parents, and educated in that society, but that, not regarding the truth they professed, she had imbibed erroneous notions; divers parts of her conduct were inconsistent with a life of self-denial; and the futile attempts made to reclaim her; then declared her not a member of the society, until by repentance she acknowledged scriptural doctrine. Miss Jerom, hearing of this sentence, sent her servant to the defendant for a copy, which he sent her under cover. After failing in an application for a criminal information, Miss Jerom procured the defendant to be indicted, tried, and convicted for libel. On motion for a new trial, the court held that, no express malice being shown, the jury ought to have been directed to acquit the defendant, and ordered a new trial.[1] A vote passed by a board of trustees of a church, censuring C., a former treasurer of such church, for obstinately retaining the church funds received by him as such treasurer in his hands, and refusing to pay them over, is privileged; but if published maliciously, will support an

412; Fairchild *v.* Adams, 11 Cush. 549; Smith *v.* Youmans, 3 Hill (So. Car.), 85. If words, actionable in themselves, be spoken between members of the same church, in the course of their religious discipline, and without malice, no action will lie; and the jury are to decide whether there be malice or not. (Jarvis *v.* Hathaway, 3 Johns. 180; and see Whitaker *v.* Carter, 4 Ired. 461.)

[1] Rex *v.* Hart, 1 W. Blacks. 386; 2 Burns' Eccles. Law, 779.

action.[1] A communication of a church member, complaining of the conduct of his clergy, addressed to their common superior, is privileged.[2] And if a selectman, acting in his official capacity, accuse a member of the church of voting twice on the same ballot, it is privileged.[3]

§ 234. The privilege extended to proceedings to enforce church discipline applies only to cases where both parties are members of the church.[4] A complaint, to a church, against one of its members by one who is not a member, is not privileged; neither would such a complaint by a member against one who is not a member, be privileged;[5] but if the party accused voluntarily submits himself to the discipline of the church, all the proceedings are privileged.[6] Where a vote of excommunication from a church has been passed, and the offender thereby declared to be no longer a member, a subsequent reading of the sentence by the pastor, in the presence of the congregation, is privileged.[7]

§ 235. The publication of defamatory matter is not privileged because made at a public meeting.[8] But at

[1] Holt *v.* Parsons, 23 Texas, 9. In an action for libel, the defendant pleaded that the words were used without malice, in a complaint to a church, of which both parties were members, for the purpose of bringing the plaintiff to trial before a committee thereof. The plaintiff replied that the charge was made willfully and maliciously, to which replication the defendant demurred. Held, that the replication was sufficient, although it contained no averment of want of probable cause. (Dial *v.* Holter, 6 Ohio St. 228; see Hinman *v.* Hare, 6 Cent. Rep. 44.)

[2] O'Donaghue *v.* McGovern, 23 Wend. 26.

[3] Bradley *v.* Heath, 12 Pick. 163. Words spoken by a pastor at a church meeting, concerning one of his congregation, held to be privileged. (Kleizer *v.* Symmes, 40 Ind. 562.)

[4] Shurtleff *v.* Parker, 130 Mass. 293.

[5] Coombs *v.* Rose, 8 Blackf. 155. A member of a lodge of masons, being on trial before one of its committees, plaintiff was called as a witness. After he had testified, defendant made an affidavit impeaching plaintiff's testimony, in which defendant deposed that plaintiff was a man of bad character, and deponent would not believe him on oath. Neither of these parties were members of the lodge; held that the affidavit was not a privileged communication. It might have been had it been made by a member of the lodge in self-defense, or against a member on trial, who would have had opportunity to meet it. (Nix *v* Caldwell, 81 Ky. 293.)

[6] Remington *v.* Congdon, 2 Pick. 310.

[7] Farnsworth *v.* Storrs, 5 Cush. 412.

[8] Lewis *v.* Few, 5 Johns. 1; Anthon, 75; Davison *v.* Duncan, 7 E. &

meetings of public bodies having certain duties to perform, what is said in the exercise of such duties, pertinent to the matter in hand, and within the jurisdiction of the meeting, is privileged. Where, at a meeting of a board of public officers, the commissioners of the New York Central Park, and in the course of a debate as to employing the plaintiff to do certain work for said commissioners, the defendant, a member of the board, objected to the employment of plaintiff on the ground that he had published an obscene libel; held, that the charge, being pertinent to the subject under discussion, was privileged, and to entitle the plaintiff to maintain an action in respect of it, he must establish that the charge was made without reasonable or probable cause.[1] The defendant at a parish meeting for the nomination of overseers, imputed to the plaintiff, who was put up for re-election, that whilst holding office previously, he had misappropriated the parish moneys; it was held to be privileged if made *bona fide*.[2] A shareholder of a railway company, having summoned a meeting of the shareholders, to which meeting he invited the reporters to the press to attend, and at which meeting he made defamatory comments on the plaintiff, one of the

Bl. 229; 3 Campbell's Ch. Justices, 64, note; see "Libel as applied to public discussion," 15 Quar. Law Mag. & Rev. 193. Davison *v.* Duncan, was questioned in Davies *v.* Duncan, 43 Law Jour. C. P. 187.

[1] Viele *v.* Gray, 10 Abb. Pr. R. 1; 18 How. Pr. R. 550. At a meeting of the proprietors of a fishery, a charge made by one proprietor against another, of having violated the law regulating the fishery, was held to be privileged. (Bennett *v.* Barry, 8 Law Times, N. S. 857.) The assessors of a town having been sued, applied to the town for reimbursement of their expenses incurred in defending, on the ground that they were sued in their official capacity. This was opposed because the suit was brought against them for making false answers, under oath, to interrogatories proposed to them in another suit. The statement of a voter and tax-payer that they had perjured themselves therein, made at a town meeting held to consider their application, is privileged if made in good faith and without actual malice. (Smith *v.* Higgins, 82 Mass. 251.) Where a rate-payer was unable to attend a parish meeting, assembled to investigate the accounts of a parish constable, and he wrote a letter to the meeting, containing defamatory matter respecting such constable, such letter was held *prima facie* privileged. (Spencer *v.* Amerton, 1 Moo. & Rob. 470; and see § 239, *post*.)

[2] George *v.* Goddard, 2 Fost. & F. 689; see Powree & Waters, Ramsey's App. Cas. 707.

directors, in his connection with the company, held that although they might have been privileged, if made at a meeting composed only of shareholders, they were not privileged at a meeting at which other than shareholders were present.[1] The plaintiff being one of the overseers, and the defendant assistant overseer of a township, a rate was made on a railway company, against which it appealed. Shortly before the hearing of the appeal, a meeting of the overseers was called to consider the matter, when it was resolved to abandon the rate, and a vestry meeting was called to choose fresh overseers and consider the propriety of removing the defendant from his office. At that meeting the plaintiff imputed to the defendant neglect of duty in collecting the rates, and having made a rate which the overseers were obliged to give up, to which the defendant retorted by saying that the plaintiff had sold the rate-payers to the railway company, and had received a bribe from them for that purpose. After the meeting a person remarked to the defendant that he ought not to have said what he did without some foundation for it; to which the defendant replied that he believed there was reason for thinking that the plaintiff had had communications with the officers of the railway company. An action having been brought for the words used by the defendant at the meeting, query, whether the words were spoken under circumstances which rendered them a privileged communication? but held, assuming they were, there was evidence of malice proper to be left to the jury.[2] But it was held not to be a justification of a charge of official misconduct against a town officer that the charge was made in open town meeting, by the defendant, an inhabitant of the town, while animadverting on the conduct of

[1] Parsons *v.* Surgery, 4 Fost. & F. 247; see Crane *v.* Waters, 10 Fed. Rep. (Mass.) 619, where it is held that a privilege exists in such a case.

[2] Senior *v.* Medland, 4 Jur. N. S. 1039.

the plaintiff as such officer, relative to a subject then before the meeting, in which the defendant was interested as a qualified voter.[1] And where a resolution was introduced into a county medical society, for the expulsion of a member, upon the ground that he had procured his admission by false pretenses, and without the legal qualifications, it was held not to be privileged, because the society had no power to expel a member for such a cause.[2] Where the defendant, one of the selectmen of the town, while he was acting as a public officer, and at an election in an open town meeting, charged the plaintiff with having put two votes into the ballot-box, it was held that the charge was privileged, principally on the ground that the defendant had a duty to perform, and that the charge was made in the performance of his duty.[3] It was held[4] that defamatory matter concerning a Roman Catholic priest was not privileged by the fact of its having been spoken at a meeting held to petition Parliament against making a grant towards the support of a Roman Catholic college.

§ 236. Nor is the publication of defamatory matter privileged because made in a true report of the proceedings of a public meeting, for "there is no analogy between the proceedings at a public political meeting and the proceedings in a court of justice;"[5] and therefore it has been held that a publication of defamatory matter, made in a report of proceedings at a public meeting called to petition Parliament against making a grant in support of a Roman Catholic college, was not privileged.[6] And where the defamatory matter was contained in a report of the proceedings of a vestry meeting, it was held not to be privileged;

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[1] Dodds *v.* Henry, 9 Mass. 262.

[2] Fawcett *v.* Charles, 13 Wend. 473.

[3] Bradley *v.* Heath, 12 Pick. 163.

[4] Hearne *v.* Stowell, 12 Adol. & El. 719.

[5] Lewis *v.* Few, 5 Johns. 1.

[6] Hearne *v.* Stowell, 12 Adol. & El. 719; 4 Per. & D. 696; Wilson *v.* Reed, 2 Fost. & F. 149; Pierce *v.* Ellis, 6 Ir. Com. Law R. 55; Davison *v.* Duncan, 7 El. & B. 231.

thus an English statute, 18 and 19 Vict. ch. 120, provided for the appointment of a medical officer in each parish, who was to report from time to time to the vestry, and such reports were to be published annually, in the month of June. A report was made to the vestry in February, and in the same month published by the defendant in a newspaper of which he was the editor and proprietor, in and as part of the proceedings of the vestry. This report contained a charge of misconduct on the part of the plaintiff; he sued the defendant for libel, and it was held that the publication being a true report of what took place at the vestry did not render it privileged.[1] But in another case a report of the condition of town schools, made and published as required by law, by the superintending school committee, and charging the prudential committee of the district with unlawfully employing a teacher, and putting her in charge of a school, taking possession of the schoolhouse, and forcibly excluding the general committee and the teachers employed by them, but not imputing corrupt motives, held privileged.[2] And so it was held that the publication, by a member of the Massachusetts Medical Society, of a true account of the proceedings of that so-

[1] Popham *v.* Pickburn, 7 Hurl. & N. 891. Query, would the publication have been privileged had it been made by the defendant after the report had been published by the vestry, as required by the statute? (*Id.*) At a meeting of a board of poor law guardians, a member of the board reported a complaint against the plaintiff, the medical officer of said union, that he did not promptly respond to calls made upon him to attend the sick poor requiring his attention. The defendants, the proprietors of a newspaper, published a true account of the proceedings at said meeting, including the said complaint; held it was not privileged: that it was not concerning a person whose position and character were of general interest to the whole country, nor was the subject-matter one of general interest to the whole country; that it was not enough that plaintiff filled a public character of a limited kind, in a limited district, or that the subject-matter was a matter of interest to a small portion of the public, or to the public in a limited district. (Purcell *v.* Sowler, 1 C. P. Div. 781.)

[2] Shattuck *v.* Allen, 4 Gray, 540; and see Haight *v.* Cornell, 15 Conn. 74. Where the defendant made a speech at a public meeting, and afterwards handed a copy of it to the reporters, who published it in a newspaper, held that such publication was not privileged. (Pierce *v.* Ellis, 6 Ir. Com. Law R. 55.)

ciety in the expulsion of another member for a cause within its jurisdiction, and of the result of certain suits subsequently brought by him against the society and its members, on account of such expulsion, is privileged; although it speaks of the expelled member as "the offender," and remarks that "the society has vindicated its action in this case, and its right to act in all parallel cases."[1]

§ 237. The right to seek redress is not limited to seeking it in a court of justice.[2] Every one who is aggrieved, or

[1] Barrows *v.* Bell, 7 Gray, 301.

[2] Padmore *v.* Lawrence, 11 Adol. & El. 380; 3 Per. & D. 209; Kine *v.* Sewell, 3 M. & W. 297; Robinson *v.* May, 2 J. P. Smith, 3. *Semble*, that words spoken to a police officer engaged in an endeavor to detect a crime, are privileged. (Smith *v.* Kerr, 1 Barb. 155. See, however, Dancaster *v.* Hewson, 2 M. & R. 176.) Plaintiff assaulted the defendant on the highway; defendant, meeting a constable, requested him to take charge of the plaintiff, and, the constable refusing to arrest the plaintiff unless the defendant would charge him with felony, the defendant did so; held, on demurrer to the defendant's plea setting up these circumstances, that they did not render the charge of felony a privileged publication. (Smith *v.* Hodgeskins, Cro. Car. 276; and see Crofoot *v.* Allen, 2 Wend. 515; Lathrop *v.* Hyde, 25 Wend. 448.) In Johnson *v.* Evans, 3 Esp. 32, plaintiff, a female, had been in the employ of defendant, and on discharging her some difference arose, the defendant charging the plaintiff with endeavoring to cheat him respecting her wages, and said, "She is a thief, and tried to rob me of part of her wages." Defendant sent for a constable, to give plaintiff in charge, and repeated these words to the constable, but did not give plaintiff in charge; the only publication proved was to the constable, and plaintiff was nonsuited. In an action of slander against the defendant, for charging the plaintiff with theft, where it appeared that the words spoken were only expressions of suspicion, founded upon facts detailed by him at the time, made prudently and in confidence to discreet persons, in good faith, with a view to their aiding him to detect the offender and recover the property stolen, it was held that they were not slanderous, but justifiable and proper. (Grimes *v.* Coyle, 6 B. Mon. 301. See Eames *v.* Whitaker, 123 Mass. 342.) The defendant having some cause to suspect the plaintiff of dishonesty, went to plaintiff's relations and made to them a charge of theft against the plaintiff; and it appearing that the object in making the communication was rather to compromise the felony than to promote inquiry, or to enable the relations to redeem the plaintiff's character, the publication was held not privileged. (Hooper *v.* Truscott, 2 Bing. N. C. 457.) The defendant, having lost goods by theft, went to the plaintiff's house with a police officer, and, in answer to questions as to the object of his visit, accused plaintiff of the theft, and stated the grounds of his belief. In an action of slander, held, that this was a privileged communication, if made *bona fide*, unless express malice were found by the jury. Nor is the privilege defeated by the fact that the charges were made in the presence of third parties and in an intemperate manner (§ 243, *post*). (Brow *v.* Hathaway, 13 Allen [Mass.], 239; see Davies *v.* Snead, Law Rep. 5 Q. B. 608; McCann *v.* Benjamin, S. C. L. R. [Sup. Ct. Low. Can.] 13.) In slander the defamatory words consisted of a

who has reasonable and probable cause to believe himself aggrieved, may, *in good faith*, seek redress from any body, officer, or individual, *having jurisdiction, power, or authority* to redress the wrong or supposed wrong (§ 238 *a*). Whatever is spoken or written in such a pursuit for redress is privileged.[1] For defamatory matter published in

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charge of burglary, uttered to a police officer, with a request to arrest plaintiff. Plaintiff was arrested and imprisoned, but, defendant refusing to make any complaint against plaintiff, he was discharged. A request to charge that if the arrest and imprisonment was lawful they were not evidence of malice, was properly refused because it ignored the question whether defendant believed the charge to be true and acted in good faith in making it. (Plummer *v.* Johnson, 70 Wis. 131.) You purchased stolen goods, knowing them to be stolen, spoken by the chief of police, held conditionally privileged. (Mayo *v.* Sample, 18 Iowa, 306.)

[1] The wife of a tradesman having been informed that an assistant in her husband's shop was dishonest, wrote, by his request, and sent to the assistant a letter accusing her of theft, and strongly reproaching her. Held, upon an indictment for libel, that the occasion was privileged, and that the wording of the letter ought not, under the circumstances, to be too nicely criticised. (Reg. *v.* Perry, 15 Cox C. C. 169.) Plaintiff and defendant were guests at a shooting festival. They and others competed for the first prize. Each person shooting was furnished with a score card, on which was recorded his score. Plaintiff claimed a score of fifty-two points, and demanded the prize. Defendant said, in the presence of the company, "that plaintiff did not score fifty-two points, that he was bluffing, that he tried a bluff game before, and was a swindler—he had swindled, and they were glad they had caught him at last." After verdict for plaintiff, on appeal the court reversed the judgment, holding defendant had the right to dispute plaintiff's claim. If he had done nothing more an action for slander would not have been thought of; adding that the plaintiff was "bluffing," and had played a "bluff" game before, adds no force to the charge, nor do the additional words, that it was "a swindle," and that the plaintiff had swindled before, make them actionable without an allegation and proof of special damages. The words used had reference to the score claimed by plaintiff, and in the sense employed they were tantamount to saying that plaintiff had claimed too much, or, in other words, that the claim was an imposition. The words used were strong and exaggerated, rude and vulgar, but not necessarily slanderous. (Eislie *v.* Walther, 4 N. Y. Suppl. 385.) A statement by a theatrical manager, one of a deputation to a cabinet minister to prevent licensing for stage plays, held privileged, and that the presence of a newspaper reporter did not take away the privilege. (Smith *v.* Musgrove, 11 Vict. Law Rep. 440.)

Fahr *v.* Hayes, 50 N. J. Law (21 Vroom), 275, is an instructive case. There defendant was a jeweler, of whom plaintiff had bought goods. Defendant missed two gold chains; these were afterwards found in plaintiff's possession. He was arrested, charged with stealing them, and indicted. Plaintiff afterwards applied for credit to one Thoma, and gave defendant as a reference. Thoma applied to defendant. Defendant, learning that plaintiff was at Thoma's store, went with Thoma, and in Thoma's store defendant spoke to plaintiff, among other things, "You thief! don't show your face in Maiden Lane; you stole two gold chains from my factory, and you are indicted!" Defendant, learning that plaintiff was using defendant's

seeking relief other than from a court of justice, the action is said to be analogous to an action for malicious prosecution,[1] with a distinction or supposed distinction which may be illustrated as thus: that redress for malicious prosecution cannot be had in an action in form for slander or libel (§ 220), while for defamatory matter published in seeking redress from any source other than a court of justice, redress may be had in the form of an action for slander or libel. To an action in form of slander or libel, it is a defense to show the publication was made to a court of justice; but it is not a defense merely to show that the publication was made upon an application for redress other than to a court of justice, unless it be also shown that the forum addressed had jurisdiction and the application was honestly made, *i. e.*, in good faith and with reasonable and probable cause. To support malicious prosecution, besides showing that the prosecution has terminated, it must be shown that the publication was without probable cause *and* with malice, *i. e.*, bad motive; bad motive alone will not support the action, if there was probable cause [§ 421, *post*]; while to support an action for a publication in seeking redress extrajudicially, it is sufficient to show

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name to obtain credit, sent a circular to jewelers warning them against plaintiff. In a suit for *slander* plaintiff had a verdict, which the court *in banc* set aside, and held: (1) Where A. applies to B. for credit, and B. seeks from C. information as to A.'s trustworthiness, a conditionally-privileged occasion arises for communications bearing on the subject, citing King *v.* Patterson, 8 Cent. Rep. 357; 20 Vroom, 417; (2) the circumstance that others not interested were present when the communication was made does not necessarily take away the privilege; (3) the motive which the law in such a case imputes to C. is a desire to give true information to B., to prevent his giving credit to A., and the question is whether there is established any other motive *contrary to good morals;* (4) the express malice which will take away the privilege is some motive different from that imputed to create the privilege, and being a motive contrary to good morals. A motive of indignation against A. for his supposed offense is not against good morals, and is not malicious *per se;* (5) malice may be inferred from the terms of the publication, or its manner of publication, or subsequent publication. (Evening Journal Asso. *v.* McDermott, 15 Vroom. 430.) A subsequent privileged publication, as, under the circumstances, the circular warning persons not to trust A., is not evidence of malice.

[1] Howard *v.* Thompson, 21 Wend. 319; Cook *v.* Hill, 3 Sandf. 349.

either want of jurisdiction in the forum addressed, or want of probable cause or bad motive; for the right to appeal to a court of justice *is general and without reference to the motive* wherever probable cause exists; but the right to seek redress, *extrajudicially, is limited to seeking it with probable cause and with a good motive* from a body, officer or individual having jurisdiction or power to afford relief.[1] In a case where the defendant had written defamatory matter to the superior of the plaintiff, an ecclesiastic, it was alleged in the complaint that the publication was made maliciously; the plea was in effect merely that the publication was made in seeking redress from an officer having jurisdiction to grant relief. On demurrer, the plea was overruled, and it was held that to constitute a defense, the plea should have gone on and alleged reasonable and probable cause for making the complaint, and that it was made with good motives.[2] It has been held that within the foregoing privilege are: petitions to the sovereign,[3] or to Parliament,[4] or to the Legislature,[5] or to the lieutenant governor of a province (Canada),[6] or to the governor of a State,[7] or to the Privy Council,[8] a memorial presented to a board of excise,[9] or

[1] Defendant having ground of suspicion, which afterwards proved to be unfounded, that he was being robbed by one of his assistants, plaintiff, made certain inquiries from two persons having no connection with the matter. To each person defendant said that plaintiff had robbed him, and that he would get him imprisoned. Held not privileged. (Harrison *v.* Fraser, 29 Week. Rep. 652.) There are authorities which represent the privilege as much wider than we have stated it. See in note 3, page 378, *post*.

[2] In O'Donaghue *v.* McGovern, 23 Wend. 26, and in Perkins *v.* Mitchell, 31 Barb. 461, a distinction is made between a complaint made to a court of justice and a complaint made elsewhere. (See Ayres *v.* Russell, 20 N. Y. St. Rep. 326.)

[3] Hare *v.* Meller, 3 Leon. 138; cited 1 Starkie on Slander, 254.

[4] Lake *v.* King, 1 Lev. 240, and *ante*, note 3, p. 329.

[5] Reid *v.* Delorme, 2 Brevard, 76.

[6] Stanton *v.* Andrews, 5 Up. Can. Q. B. Rep. O. S. 211. So of a communication to a Mayor of a city. (Evans *v.* Fraser, 4 Legal Notes, 51.)

[7] Gray *v.* Pentland, 2 S. & R. 23; 4 *Id.* 420; and see Rogers *v.* Spalding, 1 Up. Can. Q. B. 258; Corbett *v.* Jackson, *Id.* 128; Larkin *v.* Noonan, 19 Wis. 82.

[8] Proctor *v.* Webster, 16 Q. B. D. 112.

[9] Vanderzee *v.* McGregor, 12 Wend. 545.

a fire marshal,[1] or a States attorney,[2] a petition to a council of appointment praying the removal of the plaintiff from office;[3] a memorial to the post office department charging fraud on the plaintiff, a successful bidder for post office patronage;[4] a letter to the secretary of war, with the intent to prevail on him to exert his authority to compel the plaintiff (an officer in the army) to pay a debt due from him to defendant;[5] a letter to the superior officer of the plaintiff, having power to remove him, and charging him with fraud in his office;[6] a letter written to a bishop informing him that a report was current in a parish in his diocese, that the plaintiff, the incumbent of a district in that parish, had assaulted a schoolmaster;[7] charges preferred to a lodge of Odd Fellows by one member of that lodge against another, and for an offense which the lodge

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[1] Newfield *v.* Copperman, 15 Abb. Pr. R. N. S. 360.

[2] Vogel *v.* Gruaz, 110 U. S. 311.

[3] Thorn *v.* Blanchard. 5 Johns. 508. Where the complaint is to a person competent to redress the grievance, no action lies against the publisher, whether his statement be true or false, or his motives innocent or malicious. (*Id.*; see Harrison *v.* Bush, 5 El. & Bl. 344.) Representations made to the *Tsung-li-Yamen*, the chief officer of the foreign board at Pekin, held privileged. (Hart *v.* Von Gumpach, Law Rep. 4 Pri. C. Cas. 439), and so of a petition for removal of a sheriff. (Larkin *v* Noonan, 19 Wis. 82), or a petition to the Council of the Bar. (Barthe *v.* Brondreault, Ramsey's App. Cas. 420.)

[4] Cook *v.* Hill, 3 Sandf. 341. A letter of complaint written to the postmaster general, *bona fide*, of even imaginary grievances, would be privileged; and the defendant, under the general issue, may show that it was written under such circumstances as would make it a protected communication. (Woodward *v.* Lander, 6 C. & P. 548.)

[5] Fairman *v.* Ives. 5 B. & Ald. 643; 1 D. & R. 252.

[6] Howard *v.* Thompson, 21 Wend. 319; Blake *v.* Pilfold, 1 M. & Rob. 198. A petition of parties interested, to the proper authorities, against the appointment of one on the ground of his bad character, as disqualifying him for the appointment, is not actionable as a libel. (Harris *v.* Huntington, 2 Tyler. 129.) A letter or petition from an inhabitant of a school district, to the school committee, complaining of a school teacher, is conditionally privileged. (Bodwell *v.* Osgood, 3 Pick. 379; and see Maitland *v.* Bramwell, 2 Fost. & F. 623; Harwood *v.* Keech, 6 Sup. Ct. Rep [T. & C.] 665; 4 Hun, 389; Weiman *v.* Mabie, 45 Mich. 484.)

[7] James *v.* Boston, 2 C. & K. 4. If written merely with the honest intention of calling the attention of the Bishop to a rumor in the parish, which was bringing scandal on the church, and not from any malicious motive; and it is not material that the writer of the letter did not live in the district to the incumbent of which the letter refers. (*Id.*; and see O'Donaghue *v.* McGovern, 23 Wend. 26.)

under its rules had the right to investigate.[1] The trustees of the College of Pharmacy in New York, appointed a committee to inquire and report upon the capacity of the plaintiff as drug inspector of the port of New York, with a view upon the facts reported to petition for the removal of the plaintiff from his office. The committee made a written report to the board of trustees, who forwarded it to the secretary of the treasury—held that the report was privileged,[2] and so of a report to investigate prisons.[3] The defendant, the deputy governor of Greenwich Hospital, wrote and printed a large volume, containing an account of the abuses of the hospital, and reflecting with much asperity upon many of its officers; he distributed copies of this book to governors of the hospital *only;* an application for a criminal information against the defendant was denied, with the observation that the distribution had been only to persons competent to redress the grievances complained of.[4] Defendant, as chairman of a committee of

[1] Streety *v.* Wood, 15 Barb. 105. Where A. accused B. of theft before certain members of a lodge of Odd Fellows, of which both were members, and in an action for slander by A., B. attempted to justify what he said, by showing that it was the duty of Odd Fellows to keep their lodge pure, the justification was held to be insufficient. (Holmes *v.* Johnson, 11 Ired. 55.) Report of Committee of an Odd Fellows Lodge, recommending expulsion of a member for false swearing, and made in accordance with the rules of the lodge, held conditionally privileged. (Kirkpatrick *v.* Eagle Lodge, 26 Kansas, 384; and see Ostheimer *v.* Blumert, 1 City Co't Rep. Supp. 17.) Defendant, who was a sergeant in a volunteer corps, of which plaintiff was also a member, represented to the committee by whom the general business of the corps was conducted, that plaintiff was an unfit person to be permitted to continue a member of the corps; that he was the executioner of the French king, &c. Lord Ellenborough held the communication privileged. (Barbaud *v.* Hookham, 5 Esp. 109.)

[2] Van Wyck *v.* Aspinwall, 17 N. Y. 190; affi'g s. c. *sub nom.* Van Wyck *v.* Guthrie, 4 Duer, 368; and see Haight *v.* Cornell, 15 Conn. 74.

[3] *Re* State Prison Investigating Comm'e, 11 Atl. Rep. 429; 5 New Eng. Rep. 99.

[4] Rex *v.* Baillie, 21 State Trials, 1; Rex *v.* Staples, Andr. 229. In another case, the plaintiff had been a general commanding a corps of irregular troops during the war in the Crimea. Complaint having been made of the insubordination of the troops, the corps commanded by the plaintiff was placed under the superior command of V. The plaintiff then resigned his command, and V. directed S. to inquire and report on the state of the corps, and referred S. to the defendant for information. Defendant, in a conversation with S., made a defamatory statement in respect to the plaintiff on his giving up the command of

citizens, presented a petition to the governor, containing reflections by one Marrett, one of the persons for whose benefit the petition was intended, upon plaintiff, though not naming her, upon the trial it was proved that defendant did not know the contents of the petition (it having been handed to him by an attorney at the time of presentation), nor did he know the plaintiff, nor Marrett. Held, that the delivery of the pamphlet to the governor did not constitute a publication, that defendant was justified in handing the same to the governor, and the same was a privileged communication for which no action could be maintained without proof of express malice.[1] Statements contained in an affidavit presented to a superientendant of schools for the purpose of preventing a teacher's license being granted to a particular person, charging such person with improper conduct, are privileged and not actionable unless untrue and maliciously made.[2] The defendant was clerk to a board of guardians, and plaintiff the medical officer under said board. C. was the relieving officer under said board. A pauper was to be removed to another district, but previous to his removal he was to be examined by plaintiff. The defendant, under the direction of the board, called twice upon plaintiff, each time requesting him to make the examination of the pauper; but plaintiff neglected to make such examination. The defendant afterwards went to C. and complained of this neglect on plaintiff's part, and stated that plaintiff was "not sober," or, as appeared on the trial, "as drunk as a sow." Whereupon C. served plaintiff with a formal order to make the examination—held that the statement by defendant to C.

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his corps; held that it was properly left to the jury to say whether the communication was relevant to the inquiry. (Beatson *v.* Skene, 5 Hurl. & N. 838; § 242, *post.*)

[1] Wood *v.* Wiman, 47 Hun, 362.

[2] Weiman *v.* Mabie. 45 Mich. 484; and see Clontier *v.* Blackburn, 5 Legal News, 420; Donaghue *v.* Hervey, *Id.* 357.

was conditionally privileged.[1] The defendant, a subscriber to a charity, wrote a letter to the committee of management of the society concerning the plaintiff, their secretary —held privileged, if made in an honest belief in the truth of the statements.[2] And where the defendant was a life governor and medical officer of a public school, to which school plaintiff supplied butcher's meat, the defendant stated to the steward of the school that defendant sold meat by the yard, and had been hooted out of the market, innuendo that he sold bad meat. It appearing that it was the steward's duty to examine the meat supplied to the school, held that if the defendant's statement was without malice, it was privileged.[3] The defendant, the commanding officer of a regiment, wrote letters to his immediate superior, containing charges against the plaintiff, the colonel in command; defendant also had a conversation with a member of Parliament as to a question to be put in the House of Commons relative to the dismissal of the plaintiff. It was held that both the letters and the conversation were privileged, if made without malice.[4] Defendant was principal of an institution for deaf mutes, his wife received an obscene letter in a disguised hand, defendant believing the letter to have been written by plaintiff, an employee of the institution, communicated his suspicion to the executive board, whose duty it was to hire and discharge employees; in an action by plaintiff, held, such communication was a conditionally privileged one.[5]

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[1] Sutton *v.* Plumridge, 16 Law Times, N. S. 741. The charge of a bishop to his clergy in convocation is privileged (Laughton *v.* The Bishop of Sodor & Man, Law Rep. 4 Pri. C. Cas. 495), and held that under the circumstances the bishop was warranted in publishing his charge in a newspaper. (*Id.*)

[2] Maitland *v.* Bramwell, 2 Fost. & F. 623.

[3] Humphreys *v.* Stillwell, 3 Fost. & F, 590.

[4] Dickson *v.* Wilton, 1 Fost. & F. 419; see Bell *v.* Parke, 10 Ir. Com. Law Rep. 279.

[5] Halstead *v.* Nelson, 24 Hun, 395; 36 *Id.* 149; 13 N. Y. St. Rep. 211; 15 *Id.* 790; and see Keene *v.* Sprague, 30 Alb. L. J. 283.

§ 238. The privilege referred to in the last preceding section exists not only where the body, officer or individual appealed to has *direct* jurisdiction or power, but also in the cases where there is an *indirect* jurisdiction or power to afford redress; as thus, where the plaintiff was a justice of the peace for the county, and in the habit of acting at petty sessions held in a borough. The defendant, an elector and inhabitant of the borough signed a memorial addressed to the secretary of state for the home department, complaining of the conduct of plaintiff as a justice during an election for a member to represent the borough in Parliament, and praying that he would cause an inquiry to be made into the conduct of plaintiff, and that on the allegations contained in the memorial being substantiated, he would recommend to her Majesty that plaintiff be removed from the commission of the peace. The jury having found that the memorial was *bona fide*, it was held that it was a privileged communication, inasmuch as plaintiff had both an interest and a duty in the subject-matter of the communication; and the secretary of state had a corresponding duty, a justice of the peace being appointed and removed by the sovereign.[1] And where the plaintiff was an officer in the army, and the defendant, a creditor of plaintiff, defendant wrote concerning plaintiff to the secretary of war, it was held that, although the secretary had no *direct* power or authority, yet as he might exercise some influence, the communication was privileged.[2]

[1] Harrison *v.* Bush, 5 El. & Bl. 344. In Rex *v.* Baillie (3 Bac. Abr. tit. Libel, A, 2, cited 5 B. & Ald. 647), the defendant had addressed a letter to General Willes and the four principal officers of the guards, to be by them presented to the king, stating that the prosecutor had obtained from him [defendant] a warrant for the payment of money due him [defendant] from the government under promise of paying the defendant such money, and that the prosecutor had received the money and not paid it over to defendant. The court held this not a libel, but a representation of an injury shown up in a proper way for redress; yet neither the officers nor the king could give the defendant *direct* assistance in obtaining payment of the money wrongfully withheld.

[2] Fairman *v.* Ives, 5 B. & Ald. 643.

An additional protection to persons seeking redress *extrajudicially*, from public officers, is found in the difficulty referred to hereafter (§ 377 *a*), which the plaintiff may experience in proving the publication of the defamatory matter.

§ 238 *a*. The applications for redress extrajudicially, to a body officer or individual having power or jurisdiction *directly* or *indirectly*, to afford redress are privileged, appears to be well settled, and the decisions, with only *two* exceptions, either assume or expressly declare that unless the power or authority to grant relief exists either directly or indirectly, the publication is not privileged: as thus, where the defendant, a physician, gave a certificate that the plaintiff was insane, on which to base proceedings under a statute to have the plaintiff confined in an asylum; for the charge contained in this certificate the plaintiff brought an action against the defendant, and it was held that he could justify only by showing that the provisions of the statute under which the certificate purported to have been given had been strictly complied with. And by the court, "Where one intervenes voluntarily in a special proceeding not known to the common law, and not resulting in a judgment according to its forms, he must see that *jurisdiction* is acquired, and that there is in reality a proceeding in court, before he can claim any privilege."[1] A letter written to the secretary of state, complaining of the conduct of the plaintiff as clerk to a board of magistrates, was held not to be privileged, because addressed to an officer not having power to redress the wrong complained of;[2]

Perhaps Atkinson *v.* Congreve (7 Ir. Com. Law Rep. 109) may be within the same rule. And see Bell *v.* Parke (10 Ir. Com. Law Rep. 279).

[1] Perkins *v.* Mitchell, 31 Barb. 461.

[2] Blagg *v.* Sturt, 10 Q. B. 899; 11 Jur. 181; 8 Law Times, 135; 16 Law Jour. Q. B. 39. Defendant, as coroner made a communication in writing to the chief secretary for the Lord Lieutenant of Ireland, stating that the Rev. Mr. C. had said in relation to plaintiff's evidence at an inquest, that "it was nothing short of perjury." Held, not privileged. (Lynam *v.*

and upon appeal the case was affirmed in the Exchequer Chamber. So where the defendant, at a meeting of a county medical society, introduced a resolution for the expulsion of plaintiff, a member of said society, which resolution contained matter defamatory of the plaintiff; in an action for libel for publishing said resolution, it was held that, inasmuch as the society had *no power to expel a member*, the publication could not be privileged as a means of seeking redress.[1] Again,[2] where the defamatory matter was contained in an affidavit made by the defendant, at the request of one H. F. to be presented to the governor of the State of New York, to induce said governor to revoke a warrant issued by said governor for the arrest of said H. F., upon a requisition from the governor of California. After a finding by referees in favor of the defendant, on the ground that the publication was privileged, the Supreme Court, at a general term, ordered a new trial, and held there was no privilege, because the governor had no jurisdiction to revoke his warrant, the court saying that in all cases of seeking redress the "tribunal, individual or body must be vested with authority to render judgment, or make a decision in the case, or to entertain the proceeding, in order to give them the protection of privileged communications." One of the two exceptions above referred to is the case where the defendant, a time-keeper employed

Gowing, 6 Ir. L. R. 259, Exch. Div.) In an action for libel it appeared that the defendant had lodged at the plaintiff's house, and on leaving missed a memorandum book and other articles, whereupon he wrote a letter to the plaintiff's wife, in which he accused the plaintiff of having taken the missing articles, and threatened to expose him if he did not return them; the jury found that there was no malice in fact—held, nevertheless, the sending the letter to the wife was not a privileged publication—she had no authority or power to redress the supposed wrong. (Wenman *v.* Ash, 13 C. B. 836; 22 Law Jour. Rep. N. S. C. P. 190; 17 Jur. 579; 1 Com. Law Rep. 592.) A letter written merely confidentially is not thereby privileged. (Brooks *v.* Blanshard, 1 Cr. & M. 779; 3 Tyrw. 844; Wilson *v.* Barnett, 45 Ind. 164; Andrews *v.* Wilson, 3 Kerr [N. Brunswick], 86), and so of an oral communication. (Shaw *v.* Sweeney, 2 G. Greene [Iowa], 587. But see note to Wyatt *v.* Gore, Holt's N. P. 299.)

[1] Fawcett *v.* Charles, 13 Wend. 473.

[2] Hosmer *v.* Loveland, 19 Barb. 111.

on public works under a public department, wrote a letter to the secretary of the department, reflecting upon the contractor for the works. The secretary had no authority over the contractor, but it was held that, if the letter was written in *good faith*, although to the wrong person, it was privileged; but that the fact of the communication being made to a person having no authority to afford redress, was a circumstance from which want of good faith might be inferred.[1] This was but a *nisi prius* decision, nevertheless we are of opinion, the contrary decisions notwithstanding (§ 237), that we have here the true rule of law. One who has reasonable and probable cause to believe himself wronged, should be privileged in applying to any source which he has reasonable and probable cause to believe can grant him redress. In seeking redress *judicially*, a want of jurisdiction in the court to which the complaint may be exhibited, does not take away the privilege, nor should it where the redress is sought extrajudicially.[2] The other of the two exceptions above referred to is the case[3] where the plaintiff was a district school teacher, and the defendant a freeholder within the school district. The alleged libel was a representation signed by the defendant, charging the plaintiff with not being "a man of strictly temperate habits and good moral character, such as the law demands," &c. This representation was delivered to the

[1] Scarll *v.* Dixon, 4 Fost. & F. 250. F. and B. were candidates at a parliamentary election; defendant was B.'s agent, and on election day, while the polling was proceeding, defendant wrote to F.'s agent that bribery on F.'s behalf was going on. B. was elected, and on the next day defendant, in a conversation with F.'s agent, charged F. with bribery, and on the day following defendant sent to F.'s agent a writing certifying that plaintiff was guilty of a certain specified act of bribery—held that this certificate was not privileged, the person to whom it was made had no authority to investigate, punish or redress the alleged wrong. (Dickeson *v.* Hilliard, Law Rep. 9 Ex. 79.)

[2] See note 3, p. 331, *ante;* 1 Wms. Saund. 138, ed. of 1871. The creditor was mistaken in Fairman *v.* Ives (*ante*, note 2, p. 382); and the court held the defendant protected by "probable cause," in Howard *v.* Thompson (21 Wend. 330).

[3] McIntyre *v.* McBean, 13 Up. Can. Q. B. Rep. 534; see Tompson *v.* Dashwood, 11 Q. B. D. 43.

local superintendent of schools, who, not conceiving himself authorized to act upon it unless it came through the school trustees, handed the document to them. On the trial the plaintiff had a verdict. The court in banc granted a new trial, and observed that the publication was *prima facie* privileged, and not the less so because made by mistake to the wrong quarter.

§ 239. Where the privilege now under consideration may be exercised by word of mouth, orally, it also may be exercised by writing; unless, perhaps, where it is shown that it is exercised by writing rather than orally to serve some unworthy purpose; thus where an alleged libel consisted of charges made by the defendant against the plaintiff, a constable, contained in a letter to a meeting of rate-payers, it was held that, inasmuch as the charge, if made orally, would have been privileged, it was privileged when made in writing, unless the plaintiff could establish that the defendant, as a pretense for writing,[1] willfully absented himself from the meeting. So where the defendant is privileged to present a petition or memorial for redress, he does not forfeit his privilege by presenting the petition or memorial to different individuals to obtain their signatures thereto, nor, as it seems, by printing such petition or memorial, provided the presenting for signatures or the printing be done with a *bona fide* intent to carry out the purpose of the petition or memorial, and not otherwise.[2] The plaintiff was employed as mana-

[1] Spencer *v.* Amerton, 1 M. & Rob. 470.

[2] Vanderzee *v.* M'Gregor, 12 Wend. 455; Cook *v.* Hill, 3 Sandf. 341; Rex *v.* Baillie, 21 State Trials, 1; Rex *v.* Staples, Andr. 229; Van Wyck *v.* Aspinwall, 17 N. Y. 190; Laughton *v.* The Bishop of Sodor & Man, Law Rep. 4 Priv. C. Cas, 495; Klinck *v.* Colby, 46 N. Y. 427; Kidder *v.* Parkhurst, 3 Allen (Mass.), 393; and *ante*, note 2, p. 379. Where, in an action of slander against the defendant, a surveyor employed by a committee to investigate the truth of reports against the plaintiff, as having executed improperly contract work for them, which the defendant alleged on such inquiry to be the case, held that such report was not a privileged communication, it being found by the jury that the reports originated with the defendant, and were false. (Smith *v.* Mathews, 2 M. & Rob. 151.) An officer of the

ger of the factories of a joint stock company, and the auditors of the company, in auditing the plaintiff's accounts, appended to their report the following statement: "The shareholders will observe that there is a charge of £1,306 for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly." The directors submitted their own report, together with that of the auditors, to the ordinary general meeting of the shareholders of the company, according to the usual practice, and it was resolved by the meeting that the reports should be printed and sent to the shareholders. The reports, including above statement, were accordingly sent to a printer, printed, and circulated among the shareholders, and used at an adjourned meeting of the shareholders. The plaintiff having brought an action for libel against the company; held, that, as it was the duty of the directors to communicate the report of the auditors to the shareholders, and it was for the interest of all the shareholders to be informed of the report, the printing and publication of the report were *prima facie* privileged; and there was no evidence for the jury, extrinsic or intrinsic, of express malice.[1] Where it is the prescribed duty of one to report upon any matter, then what he may report without malice and with a reasonable belief in its truth, is privileged.[2] (§ 209.)

navy has no right to make communications, except to the government, upon subjects with which he becomes acquainted in his professional capacity; and, therefore, a letter written to Lloyd's Coffee-house, about the conduct of the captain of a transport ship, by a lieutenant who was superintendent on board, was held not to be a privileged communication. (Harwood *v.* Green, 3 Car. & P. 141; and see Robinson *v.* May, 2 J. P. Smith, 3.) A physician is not privileged to publish defamatory matter of his patient. (Alpin *v.* Morton, 21 Ohio St. R. 536; see 5 Quebec Law Rep. 267; and S. C. Ramsey's App. Cas. 420.)

[1] Lawless *v.* Anglo-Egyptian Cotton Co. Law Rep. 4 Q. B. 262. A member of a friendly society issued a circular addressed to the members of the society for the alleged purpose of obtaining a statutory investigation into the solvency of the society upon an application for an injunction against the distribution of such circular; it was held not to be a privileged publication. (Hill *v.* Hart-Davis, 21 L. R. Ch. D. 798.)

[2] See note 1, p. 308, *ante*.

As where a law required every physician should report to the Board of Health all cases of small pox coming to his knowledge; held, that a physician who, without malice, but erroneously, reported to the Board of Health that his patient was diseased of the small pox, whereby the patient was against her will taken from her home to the small pox hospital, was not thereby liable to an action at the suit of the patient.[1] A report by a foreman respecting the men under him,[2] by a steward as to the character of a house on his employer's estate.[3] Defendant was secretary of a society formed to investigate the merits of applicants for charity, information furnished by him in good faith to one interested to be informed, held privileged.[4] So the report of a commission appointed to make an investigation upon charges of malfeasance and nonfeasance in the management of a prison, of the facts elicited by their inquiry is privileged.[5]

§ 240. Every one has, also, and independently of the privileges to which we have heretofore referred the right to publish all that he has reasonable and probable cause to believe necessary to protect his person, his property, or his reputation from loss or injury.[6] Held that this rule applied

[1] Brown *v.* Purdy, 54 Superior Co't (22 J. & S.), 109.

[2] Suprenant *v.* Gobeille, 7 Legal News, 195.

[3] Brett *v.* Watson, 20 Week. Rep. 723.

[4] Waller *v.* Loch, 7 Q. B. D. 619. This case resembles that of information furnished by a commercial agency.

[5] *Re* Investigating Commission, 11 Atl. Rep. (R. I.) 429; Beloe *v.* Wren, 19 The Reporter, 510.

[6] The defendant was a baker who employed several men to deliver bread to his customers. The plaintiff was one of the men so employed. After plaintiff had left defendant's employ, defendant published a notice to the effect: The plaintiff having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice, he has nothing further to do with my business. This was held to be privileged. (Hatch *v.* Lane, 105 Mass. 394.) The plaintiff had been agent of defendant. After he left defendant's employ, defendant published in a newspaper an advertisement, headed "Caution," and containing the words, "N. B.—Notwithstanding the false statements of [plaintiff] to the contrary, he is no longer an agent of this company," with an innuendo, meaning that plaintiff had falsely and for improper purposes pretended to be an agent of the defendant; and in another count the meaning alleged was that plaintiff had been dismissed for improper conduct—held that the publication was privileged.

to protect the publishers of a newspaper, in commenting severely on the conduct of a pilot, who delayed their dispatches to the advantage of another paper.[1] Where the defendant advertised that his wife had eloped from him, and cautioned all persons from trusting her, a motion for a criminal information against him for making this publication was denied, because the advertisement was the only means he could adopt to protect himself.[2] Defendant's wife, a stockholder in a street car company, informed her husband (defendant) that she heard persons boast that the car driven by plaintiff was "a good deadhead car" for them. Defendant informed the foreman, who, without investigation, discharged plaintiff. There being no proof of malice; held, an action of slander would not lie.[3] Where A., who had dealt with the defendant, a butcher, suddenly ceased to deal with him, alleging as a reason that defendant had made charges against him, A., for meat which had not been delivered at A.'s house, the defendant wrote a letter to A., protesting his innocence of the alleged overcharge, and stating, in effect, that the meat had been improperly disposed of by the defendant's servants. For writing this letter, the plaintiff—whose wife was a servant in the family of A.—brought an action for libel; it was held that if by the letter the defendant meant

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(Holliday *v.* Ontario Farmers' Mut. Ins. Co. 33 Up. Can. Q. B. Rep. 558; and see Gassett *v.* Gilbert, 6 Gray [Mass.], 94; Mulligan *v.* Cole, Law Rep. 10 Q. B. 550.) To create a privileged occasion, there must be not only an interest in making the communication, but also a legitimate interest in the matter communicated. (Simmonds *v.* Duane, Ir. Rep. 5 Com. Law, 358; see Elsworth *v.* Hays, 37 No. West. Rep. 249; and Slander of Title, § 207, *ante*.

[1] Lyons *v.* Townsend, 2 Edm. Sel. Cases, 452. The discharge lists which it is the duty of each division agent of a Railroad Company to send monthly to his fellow agents to put them on their guard against men whom he has discharged, are within the rule of qualified privilege. (Bacon *v.* Mich. Cent. R. Co. 55 Mich. 224.) Statements made *bona fide* by rival applicants for land under the Victoria Land Act; held privileged (Finn *v.* Hunter, 12 Vict. Law Rep. 656.)

[2] Rex *v.* Elms, cited in Rex *v.* Staples, And. 229; and see *ante*, § 226.

[3] Haney *v.* Trost, 34 La. Ann. 1146.

bona fide to defend himself, it was a conditionally privileged publication.[1] The plaintiff, an attorney's clerk, made an affidavit in a suit in which the defendant appeared for an opposite party. The affidavit reflected upon the defendant, whereupon defendant wrote to plaintiff's employers complaining that the affidavit of plaintiff suppressed the truth. The defendant's letter held a conditionally privileged publication.[2] Where Q., having had no previous knowledge of B., a trader, sold him goods to the amount of £62 10*s.*, at two months' credit—upon going to B.'s shop at the expiration of the credit, A. found that the whole stock in trade, including a portion of the goods sold by him, had been sold by auction the previous day, by B.'s desire, and at a reduction of 30 per cent., and that the proceeds were in the hands of S., the auctioneer. Upon inquiry, A. could not learn where B. was to be found. He thereupon went to his attorneys, and they, on his behalf, served on S. a notice not to part with the proceeds of the sale, the said B. having committed an act of bankruptcy. B. had, in fact committed no act of bankruptcy, the goods having been sold for the purpose of his retiring from business. Held, by Tindal, C. J., Coltman, J., and Erle, J.,

[1] Coward *v.* Wellington, 7 C. & P. 531. The prosecutor published in a newspaper matter reflecting upon the character of A. The defendant, an attorney, and the attorney for A., published a counter statement,—held that if such statement was honestly intended to vindicate A., it was privileged. (Reg. *v.* Veley, 4 Fost. & F. 1117.) Defendant, a member of a church, was appointed, with plaintiff and other members of the same church, on a committee to prepare a Christmas festival. Defendant declined to serve, and being asked why, said that C. W., another member of the committee, a married man, had the venereal disease; he had been with plaintiff—held not a privileged communication. (York *v.* Johnson, 116 Mass. 482; and see McCullough *v.* McEntee, 13 Up. Can. C. P. Rep. 438.)

[2] Buckley *v.* Kiernan, 7 Ir. Com. Law Rep. 75. The owner of a patent suspecting plaintiff was infringing, employed B. to ascertain what was the fact. B. employed C. to assist him. Together B. and C., believing they had discovered an infringement by plaintiff, so reported to the patentee; held, a conditionally privileged communication. (Knowles *v.* Peck, 42 Conn. 386.) Defendant was employed by A. to serve process on L., plaintiff. Defendant wrote A. "If L. swears I did not serve him with a copy of that writ, he swears to a lie." Plaintiff complained of this as a charge of perjury. Plaintiff failed. (Lang *v.* Gilbert, 4 All. [New Bruns.] 445.)

(Cresswell, J., *dissentiente*), that A. had such an interest in serving the notice as to render it a privileged communication, if it was served with good faith and under the *bona fide* belief that B. had committed an act of bankruptcy.[1] The owner of a ship employed plaintiff as her master, and afterwards applied to defendant to insure the ship. Defendant refused to insure if plantiff was to be her master, *giving no reason.* Plaintiff applied to defendant to withdraw such refusal and to insure, this defendant declined to do, and in consequence plaintiff lost his position. To plaintiff's statement of cause of action defendant pleaded the facts, and that the reason of their refusal to insure while plaintiff remained master of the ship was information they had received of his being of intemperate habits. This was held to be a good defense.[2] Where the defendant published an advertisement as follows: "Ten guineas reward. Whereas, by a letter received from the West Indies, an event is stated to be announced by a newspaper that can only be investigated by these means—this is to request that if any person can ascertain that J. D. [the plaintiff, describing him] was married previous to 9 A. M. on, &c., and will give notice to J. [the defendant], he shall receive the reward"—held, that if the publication was with the *bona fide* view of finding out the fact referred to, it was privileged, and the jury found a verdict for the defendant.[3] And where the libel was contained in an advertisement stating the issue of process against the plaintiff, and that

[1] Blackham *v.* Pugh, 15 Law Jour. Rep. 290, C. P.; 2 C. B. 611; approved, Davies *v.* Snead, Law Rep. 5 Q. B. 608. Where one person applies to another for credit, and the latter seeks information from a third as to the trustworthiness of the applicant, a privileged occasion arises for communications bearing on that subject. (Faher *v.* Hayes, 50 N. J. L. 275; see Commercial Agency.)

[2] Harmon *v.* Falle, 4 App. Cas. 247.

[3] Delany *v.* Jones, 4 Esp. 191. In Lay *v.* Lawson, 4 Adol. & El. 798, Ld. Denman, referring to Delany *v.* Jones, said: "I have great doubt whether, there, the interest which the wife had in the inquiry could justify the offering a reward in a newspaper." (See Finden *v.* Westlake, Mo. & Malk. 461.)

he could not be found, and offering a reward for such information as should enable him to be taken; plea, that a *capias* had been issued and delivered to the sheriff, and that the plaintiff kept out of the way, and that the advertisement had been inserted at the request of the party suing out the writ, to enable the sheriff to arrest; held a sufficient defense.[1] The plaintiff had a litigation with an insurance company of which the defendant was the agent. The plaintiff published a pamphlet accusing the directors of the company of fraud, &c. This was met by a pamphlet published by the directors. Afterwards, a person desirous of effecting an insurance, inquired of defendant as to the truth of the charges contained in the plaintiff's pamphlet, and thereupon the defendant handed to such person a copy of the pamphlet published by the directors; for this the plaintiff sued the defendant, and it was held that the defendant's act was *prima facie* privileged, and that if he acted without malice, no action could be maintained.[2] Defendant, manager of a printing establishment, had a dispute with A. relative to some printing items; they agreed to submit the matter in dispute to any *respectable printer indifferent between them* whom A. should name. A. named plaintiff, defendant refused to submit the matter to him. Being subsequently called upon by A. to pay a part of plaintiff's remuneration as arbitrator, defendant wrote to A. repudiating the demand and stating as his reason for not submitting the matter to plaintiff as arbitrator, that he had discharged plaintiff from his employment for intemperance. Held *prima facie* privileged.[3] In an action for libel, in publishing of plaintiff, in a newspaper, imputations of untruthfulness, insolvency, and conduct discreditable to his position as a poor law guardian; plea, that defendant was medical officer of

[1] Lay *v.* Lawson, 4 Adol. & El. 795.
[2] Hobbs *v.* Bryers, 2 Law R. Ir. 496.
[3] Koeing *v.* Ritchie, 3 Fost. & F. 413.

the Union in which plaintiff was guardian, and he, defendant, having as part of his official duties, caused the seizure of certain diseased meat, &c., for which seizure he had been sued, and he had incurred certain costs in his defense; and that, at a meeting of the board of guardians held subsequently, plaintiff knowing that the proceedings at such meeting would be reported in the newspapers, and for the purpose of having such statement published, plaintiff stated as part of the proceedings of said meetings, that defendant had acted wrongly in causing such seizure, and that his costs ought not to be paid; that these statements were afterwards published in a newspaper; and that, to prevent credit being given to said statements by the public, and in self-defense, defendant had published the alleged libel, believing the same to be true and without malice—on demurrer, the plea was held bad.[1] An underwriter, in discussing with the agent of the assured a claim for a total loss, made a statement purporting to be founded upon a letter implying a design on the part of plaintiff to make a dishonest claim; this was held to be privileged, unless made with an intent improperly to reduce plaintiff's claim.[2] Plaintiff, a member of a church of which C. was curate, was introduced by H., also a member of said church, to the defendant, the incumbent of a parish in which plaintiff was visiting, and where he became acquainted with F., one of defendant's parishioners. F. afterwards sued plaintiff for the

[1] Murphy *v.* Halpin, Ir. Rep. 8 Com. Law. 127. And the case was distinguished from O'Donoghue *v.* Hussey, (Ir. Rep. 5 Com. Law. 133), in which it was held: "If a party choose to have recourse to a public newspaper, and publish statements reflecting upon another, the aggrieved party may have recourse to the public press for his defense and vindication, and if, in so doing, he reflects upon the character or conduct of his assailant, it will be for the jury to say whether he did so honestly in self-defense, or was actuated by malice towards the party who originally assailed him." (See §§ 414, 415, *post.*)

[2] Hancock *v.* Case, 2 Fost. & F. 711. Where one to whom a cargo was consigned claimed that a part of it had not been delivered, and at interviews with those representing the vessel, respecting payment of freight, declined to pay the full amount, stating that the captain [plaintiff] had robbed the cargo, held privileged. (Clapp *v.* Devlin, 35 Superior Ct. [3 Jones & S.] 170.)

price of a horse and other matters, and defendant was applied to by C. at plaintiff's instance, to arbitrate between plaintiff and F.; defendant at first declined, and on being further pressed to act, wrote C., as one reason for not acting, that plaintiff's conduct was so bad that he should not like to have his name associated with his affairs; and he enumerated certain charges which he had heard made against the plaintiff, adding that it grieved him much to make these statements respecting a man who evidently wished to be considered a religious man and a good church man, but that he thought it was his duty to unmask him to C., and that he would be thankful to be enabled to tell some of his neighbors that plaintiff's position at C.'s church was not quite what he [plaintiff] had led them to suppose it to be. C. handed this letter to plaintiff, who brought an action for libel against defendant. In an interview which defendant afterwards had with said H., defendant complained of the action which had been brought against him, and spoke of what he had heard against plaintiff's character. H. assured him he was mistaken, and that she would question plaintiff about the truth of these charges. She did so, and wrote defendant that she was confident he had been misinformed about plaintiff, as he had assured her there was not the slightest foundation for what was reported of him, and stated the reasons plaintiff gave in support of his character. Defendant wrote in reply, "Time will show whether I have been misinformed or not respecting Mr. W. [plaintiff]. A writ has been served upon me, and a public investigation must therefore take place. If he states on oath, in the witness box, what he has stated to you, especially as to the charge of assault, he will be most certainly prosecuted for perjury, for there is not a shadow of a doubt but that the complaint of the servant girl is correct." Plaintiff brought another action for libel in respect of this last letter. The actions were

consolidated. The jury found there was no malice, and it was held that both letters were privileged, and verdict entered for defendant.[1]

§ 241. Every one who, with reasonable cause for the belief, *believes* himself to be possessed of knowledge which, if true, does or may affect the rights and interests of *another*, has the right, *in good faith*, to communicate such his belief *to that other* (§§ 243, 244).[2] He may make the communication *with* or *without* any previous request, and whether he *has* or *has not* personally any interest in the subject-matter of the communication, and although no reasonable or probable cause for the belief may exist. The right is founded on the *belief*.[3] "All we have to examine is whether the defendant stated more than what he believed, and what he might reasonably believe; if he stated no more than this he is not liable."[4] If A. believes that B. is in-

[1] Whitely *v.* Adams, 33 Law Jour. 89, C. P.

[2] Davis *v.* Reeves, 5 Ir. Com. L. Rep. 79; Owens *v.* Roberts, 6 *Id.* 386. A parent has the right to know the reports charging his minor child with immoral conduct, and a person knowing of such report has a right, in good faith, on the parent's request to impart his information. (Long *v.* Peters, 47 Iowa, 239.) Defendant, a government detective, knowing that M. was partner of plaintiff, in answer to an inquiry by M., informed M. that plaintiff was connected with a gang of burglars which the defendant had been the means of breaking up—held privileged. (Smith *v.* Armstrong, 26 Up. Can. Q. B. 57.) "A communication is privileged when made in good faith in answer to one having an interest in the information sought, and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such a relation to him as to make it a reasonable duty, or at least proper that he should give the information." (Allen, J., Sunderlin *v.* Bradstreet, 46 N. Y. 191; see Montgomery *v.* Knox, 23 Fla. 595; Mott *v.* Dawson, 46 Iowa, 533.)

[3] Defendant and others were talking of a prayer meeting to be held at defendant's house, and it being suggested that plaintiff would attend, defendant said he would not allow him to come, and being asked the reason said plaintiff had been guilty of beastiality (naming the offense). On a subsequent occasion, being asked to withdraw the charge, he refused, and said he was not mistaken, and would take oath of it. On the trial it was left to the jury to decide on the *bona fides* of defendant's charge, and that if defendant *believed* what he said to be true, the occasion would justify him. The jury found for the plaintiff. A motion for new trial was denied. (McCullough *v.* McIntee, 13 Up. Can. C. P. Rep. 438; see York *v.* Johnson, 116 Mass. 482.)

[4] Cockburn, Ch. J., Spill *v.* Maule, Law Rep. 4 Ex. 237. If a man act *bona fide* on honest belief of the truth of statements made to him by others whom he believes to be credible persons, he is justified in so acting upon

tending to rob C., he has the right to communicate his belief to C., without waiting for C. to inquire on the subject; and if in so doing he injures B., B. is without redress. The exigencies of society require that such a right should exist. A.'s duty to B. is simply not *unnecessarily* to injure him (§ 48). This right must be exercised as every other right is required to be exercised, in good faith (§ 40); and all communications made in the exercise of this right are conditionally privileged (§ 209).[1]

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such statements, if he believes there is reasonable and probable cause for his so doing. The question is not whether the statements were right or wrong; it is were they told the defendant, and did he believe them. (Cockburn, Ch. J., Chatfield *v.* Comerford, 4 Fost. & F. 1008.) In Hermann *v.* Seneschal, 13 C. B. (N. S) 392, an action for false imprisonment on a charge of passing counterfeit coin, the jury found (1) that defendant acted *bona fide;* (2) that he did *not reasonably believe* plaintiff guilty of the offense charged; held, that the second finding would entitle plaintiff to recover; and see Plummer *v.* Johnson, 74 Wis. 131. There is a distinction between an *honest* but *mistaken* representation, and a *dishonest* representation. (Merewether *v.* Shaw, 2 Cox Chan. Cas. 134, 135.) "It is enough to say that I know of no case where a man making an *honest* representation, when called upon to give an account of the circumstances of another, has been made liable in this respect to answer for what he has so represented." (*Id.*) Hearsay is probable ground for belief. (Maitland *v.* Bramwell, 2 Fost. & F. 623; Lister *v.* Perryman, Law Rep. 4 Ho. of Lords, 521; rev'g Perryman *v.* Lister, Law Rep. 3 Ex. 197; and see Keyter *v.* Leroux, 3 Menzies' Rep. 23; Owens *v.* Roberts, 6 Ir Com. Law Rep. 386.) Belief is the only real evidence of good faith. (Plummer *v.* Johnson, 70 Wis. 131; Smith *v.* Smith, 41 No. West. Rep. [Mich.] 499,)

[1] For words "spoken in good faith, to those who have an interest in the communication, and a right to know and act upon the facts stated," no action can be maintained without proof of express malice. (Shaw, Ch. J., Bradley *v.* Heath, 12 Pick. 163.) See note 1, p. 300, *ante*. "A written communication between private persons concerning their own affairs is *prima facie* privileged. . . . When both the party making and the party receiving the communication have an interest in it, it has never been doubted that it was privileged." (Moore *v.* Manuf. B'k, 21 N. Y. St. Rep. 653; Klinck *v.* Colby, 46 N. Y. 427; Ormsby *v.* Douglass, 37 N. Y. 477; Atwell *v.* Mackintosh, 120 Mass. 177; Erben *v.* Dun, 12 Fed. Rep. 526; Horne *v.* Milne, 7 Vict. Law Rep. 9.) And one part of a publication may be privileged, because made to a person interested, and another part not privileged: thus, where the plaintiff and defendant were jointly interested in property in Scotland, of which C. was manager, defendant wrote to C. a letter, principally about the property and the conduct of the plaintiff with reference thereto, and containing a charge against the plaintiff with reference to his conduct to his mother and his aunt; held, that so much of the letter as related to the property was privileged, but the remainder was not. (Warren *v.* Warren, 1 Cr. M. & R. 250; and see Humphreys *v.* Stilwell, 2 Fost. & F. 590.) Where there are several distinct [divisible] statements (§ 145), some privileged and some not privileged, those not privileged are not protected by those that are privileged. Where a statement is privileged, the privilege is not necessarily lost by the

The existence of this right, as will presently be shown, in cases where the communication is made by one having no personal interest in the subject-matter of the communication, and *without* any previous request, has been questioned; nevertheless we feel justified in laying it down for law that the right exists as well where *there is not* as where *there is* a previous request, and whether the publisher *has* or *has not* any such personal interest. The right, as we conceive, in no wise depends either upon the fact of a previous request[1] or upon the interest of the publisher, although the fact that the communication is made *officiously*, as it is termed, *i. e.*, unsolicited, or by one having no interests involved, may in *some* cases have a tendency to disclose *the motive* of the publisher in making the publication.[2] The right, where the publisher is interested, or where the communication is made upon the request of the party in interest, seems never to have been doubted; thus, where the language published imputed habits of intemperance to the plaintiff, a dissenting minister, it was held privileged because spoken in answer to inquiries.[3] So a

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mere fact that the publication was made rashly and without sufficient inquiry. (Clarke *v.* Roe, 4 Ir. Com. Law Rep. 1.)

[1] It was wholly immaterial whether the defendant was asked to make the statement or whether he volunteered it. In either case it was privileged, unless malicious. (Harwood *v.* Keech, 6 Sup. Ct. Rep. [T. & C.] 665; 4 Hun, 389.) See, however, Byam *v.* Collins, 111 N. Y. 143, where the prevailing opinion lays great stress upon the fact of the publication being unsolicited.

[2] "If I know that a villain intends to defraud or in any way to injure my neighbor, it is doubtless my duty as a good citizen, and as a Christian man, to put him on his guard. But there is no rule of law which renders me liable for his loss in case of my neglect of this duty. It is a moral duty, simply, not recognized by law. Certainly there is no law which requires, upon mere suspicion or belief, that I should thrust myself into the business affairs of my neighbors, and endeavor to transact for them their concerns." (Hunt, J., Ohio R. R. *v.* Kasson, 37 N. Y. 224.)

[3] Warr *v.* Jolly, 6 C. & P. 497. A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege, would be slanderous and actionable. (Harrison *v* Bush, 5 El. & Bl. 344.) Where a party has a mutual interest with another, he is justified in prevailing on him to become party to a suit, and expressions of angry and strong animadversion on the conduct of the party impeached, unless malicious, are privileged; and, in the case of words, the

letter written to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which B., the writer of the letter, was likewise interested, was held to be a privileged publication.[1] And where A., being tenant of B., was desired by B. to inform him if he saw or heard anything respecting the game, A. wrote a letter to B., informing B. that his game keeper (the plaintiff) sold game,—held, that if A. had been so informed, and believed the fact so to be, this was a privileged communication, and that the game-keeper could not maintain any action for libel.[2] So where the

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jury merely take into consideration the whole conversation to see whether particular words, which may be actionable in themselves, are qualified so as not to convey the primary meaning. (Shipley *v.* Todhunter, 7 C. & P. 680.)

[1] On the trial a juror was withdrawn. (McDougall *v.* Claridge, 1 Camp. 267.) See Conneck *v.* Wilson, 2 Kerr [New Brunswick], 496. Representations as to stockholders. (Hanna *v.* De Blaquiere, 11 Up. Can. Q. B. 310.) As to school teacher. (McIntyre *v.* McBean, 13 *Id.* 534.) "Defendant being a resident of the school district in which it was intended to employ plaintiff as a teacher, and having a daughter he desired to send to said school, it was not only his right, but his duty, if she was a woman of bad character, to communicate to the trustees such information as he possessed in reference to her character, and the communication thus made was privileged, and the plaintiff could not recover without proof of express malice." (Mullen, P. J., Harwood *v.* Keeck, 6 Sup. Ct. Rep. [T. & C.] 665; 4 Hun, 389; Decker *v.* Gaylord, 35 Hun, 584; Smith *v.* Bennett, 9 Week. Dig. 549; O'Connor *v.* Sill, 21 The Reporter, 781.) "I told H. I believed he (plaintiff) murdered J., and all the neighbors believed it," held privileged. (Harper *v.* Harper, 10 Bush [Ky.], 447.) This decision seems to have proceeded on the ground that defendant spoke for the public benefit.

[2] Cockayne *v.* Hodgkisson, 5 C. & P. 543. Defendant was steward of an estate; he was directed by his employer to inquire as to the existence on the estate of a house of bad repute; defendant made inquiries and was informed that a house of a certain number, in a certain street, was a house of bad repute; the number and name of street indicated plaintiff's house; defendant, doubting the accuracy of the information he had received, made further inquiries, and in so doing repeated the information he had received; he then ascertained that the wrong street number had been given him, and that plaintiff's house was not the house intended to be pointed out to him; held, if defendant's statements concerning plaintiff's house were made in pursuance of his duty to his employer, they were privileged. (Brett *v.* Watson, 20 Weekly Rep. 723.) It is no justification for publishing defamatory language that a cause was about to be tried in which defendant was interested, and plaintiff was to be a witness, and defendant spoke the words in confidence, and to ascertain what plaintiff would testify to on such trial. (Wilson *v.* Barnett, 45 Ind. 164.) As to confidential communications, see note 2, p. 383, *ante*.

plaintiff had requested his friend, R. A., to open a correspondence with the defendant in reference to certain charges made by the defendant concerning the plaintiff, held that letters written by the defendant to R. A. were privileged communications.[1] Where, in an action for libel, it appeared that the plaintiff was church warden and defendant clergyman of the same parish, and that differences having arisen between them in that relation, the plaintiff requested that the defendant's future communications should be by letter to the plaintiff's clerk. The defendant afterwards applied by letter to the clerk for rent which he conceived to be due him from the plaintiff. The clerk answered that defendant denied his liability, and in reply the defendant wrote the clerk, "This attempt to defraud me of the produce of the land is as mean as it is dishonest,"—held that the communication was not privileged in itself; that it was a question for the jury whether the language was justified by the occasion, but that the judge was right in directing the jury that the communication was actionable.[2] In an action for slander plaintiff's attorney wrote defendant, demanding an apology. In reply defendant wrote plaintiff's attorney, stating certain dishonorable conduct of plaintiff, which caused defendant to speak the alleged slander, and warned the attorney to look out for his costs, as a person guilty of such dishonorable conduct could not be trusted. Held, that the communication was *prima facie* privileged; that the warning was a deduction from the subject-matter; that it was the

[1] Hopwood *v.* Thorn, 8 C. B. 293; Sayer *v.* Begg, 15 Ir. Com. L. Rep. 458.

[2] Tuson *v.* Evans, 4 Per. & D. 396. Where, in an action for defamation, it appears that a defendant, authorized by his relation to the party addressed to make a "privileged communication," in professing to do so [he knowingly] makes a false charge, the inference of malice is against him, and the burden is put on him to show that he acted *bona fide*. (Wakefield *v.* Smithwick, 4 Jones' Law [N. Car.], 327; Harwood *v.* Keech, 6 Sup. Ct. Rep. [T. & C.] 665; 4 Hun, 389: and see Hartwell *v.* Vesey, 3 Law Times, N. S. 275; Cole *v.* Wilson, 18 B. Monr. 212, and § 389, *post*.)

province of a jury, and not of the court, to say whether this deduction was in excess of the privilege.[1] An attorney having, at plaintiff's desire, written the defendant demanding payment of an alleged debt, the defendant sent a letter to the attorney containing gross imputations on the plaintiff's character, wholly unconnected with the demand made upon him; held not a privileged communication, although the jury found that the letter was written *bona fide*, and negatived malice in fact.[2] A., the plaintiff, was party to a suit in chancery by B., his next friend, who was answerable for the costs of the suit. A. expressed a desire to change his solicitor in that suit, which coming to the knowledge of the defendant, he wrote a letter to B., in which, amongst other things, he stated that A. had been apprenticed to a civil engineer, and had had a present made him of his indentures, because he was worse than useless in the office; in an action of libel by A., held that the letter was a privileged publication.[3] The owner of a building which has been set on fire may caution the persons employed by him therein against a particular person, suspected of being the incendiary; and his statements to them, if made in good faith for this purpose, are privileged communications, although they contain an

[1] Jacob *v.* Lawrence, 14 Cox C. C. 321 Ir. Q. B. D.

[2] Huntley *v.* Ward, 6 C. B. N. S. 514; and see *ante*, note 2, p. 383. A claim having been made against defendant's principal, he, defendant, wrote in reply, and explaining that plaintiff had no cause of action. held privileged. (Halloran *v.* Thompson, 13 C. B. 333.) A correspondence was had between plaintiff's attorney and defendant, respecting a claim for damages made by plaintiff against defendant; defendant, in justifying himself, used defamatory language concerning the plaintiff; held privileged. (Sayer *v.* Begg, 15 Ir. L. R. N. S. 458; Nolan *v.* Connell, 5 A. J. R. 20.) Defendant published in a newspaper that plaintiff had attempted to decoy away his clients. Plaintiff, in a denial in the same newspaper, characterized defendant's statement as "a contemptible, cowardly and malicious lie." Defendant replied by referring to plaintiff's "known character as a liar," and that any person "scoundrel enough" to have acted as plaintiff had "would be unprincipled enough to deny it." Held, that under the statute of Virginia defendant's reply was privileged, and it ought to have been left to the jury to say whether he acted *bona fide*, and only in the protection of his own interest. (Chaffin *v.* Lynch, 83 Va. 106.)

[3] Wright *v.* Woodgate, Tyr. & Gr. 12.

unfounded criminal charge against the suspected person.[1] An insurance company, of which the defendant was president, made an insurance against fire on the property of one Graves in the occupation of the plaintiff; an application was made to the company to alter the policy; the application was refused, and notice given that the policy would be canceled. Graves inquired the reason for this, and was told by the defendant that the company would not insure any building occupied by plaintiff, as a building insured by the company and occupied by the plaintiff had been burned under very suspicious circumstances, adding: "What would you think of a man being seen round the store at two or three o'clock in the morning before the fire?" this was held to be a privileged communication.[2] The defendant had the right to give Graves a reason for the company refusing to insure the building owned by him, and Graves was interested to know the opinion the defendant entertained concerning the plaintiff. So where the plaintiff was secretary of the Brewers' Insurance Company, and he being charged with misconduct was called upon to attend a board of directors, for the purpose of explanation, but declined to do so; whereupon the directors, after hearing the charges, passed a resolution that he had been guilty of gross misconduct, and dismissed him. The defendant, a director of that company, and also of the London Necropolis Company, of which the plaintiff was auditor, communicated the fact of the plaintiff's dismissal "for gross misconduct" at a board meeting of the latter company, and proposed a resolution to dismiss him, and,

[1] Lawler *v.* Earle, 5 Allen, 22. Action by husband and wife against husband and wife for slander. Plaintiff and the male defendant were tenants, under T, of adjoining parcels of land. Plaintiff was under prosecution for maliciously burning his buildings. The female defendant said to T., it would be worth your while to go and see the house that *she* [the female plaintiff] burned herself, held not privileged. (Gillis *v.* M'Donell, Ir. Rep. 4 C. P. 342.)

[2] Liddle *v.* Hodges, 2 Bosw. 537. Information to the president of an insurance company in which plaintiff was insured, held privileged. (Noonan *v.* Orton, 32 Wis. 106.)

in answer to an inquiry from the chairman, said that the misconduct consisted in "obtaining money from the solicitors of the company under false pretenses, and paying a debt of his own with it;" in an action for slander it was held that the publication was conditionally privileged.[1] The defendant being a competitor with the plaintiffs for a contract with the navy board for African timber, the plaintiffs obtained the contract. Defendant then agreed to supply plaintiffs with a portion of the timber, and made no objection to taking their bills in payment. Afterwards this agreement was rescinded, and defendant wrote to a merchant who was to supply the timber to carry out the agreement, and of whom the defendant was a creditor, and the sole correspondent in London, reflecting on the plaintiffs' mercantile character, and putting said merchant on his guard against them. In an action for libel in making this communication, a verdict having been found for the defendant on the ground of privilege, the court granted a new trial.[2] The plaintiff was a dealer in beer, buying it of a brewer and selling it to publicans. Plaintiff wishing to open an account with the defendant, a brewer, one L., became his [plaintiff's] surety for the price of such beer as defendant should from time to time supply the plaintiff, he [defendant] promising to inform L. of any default made by plaintiff in his payments. After plaintiff and defendant had dealt together for some time, defendant went to L. and spoke in very abusive terms of plaintiff, saying he wished to cheat him, and that he had returned as unmerchantable beer he [plaintiff] had adulterated, and

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[1] Harris *v.* Thompson, 13 C. B. 33; see Parsons *v.* Surgey, 4 Fost. & F. 247.

[2] Ward *v.* Smith, 6 Bing. 749. In Van Spike *v.* Cleyson (Cro. Eliz. 541), it is said not to be actionable for one man to tell another *confidentially* not to trust another, if done only by way of counsel. Words of a tradesman that he would soon be a bankrupt, when spoken in confidence and friendship as a caution, held not to be actionable unless the jury found there was malice. (Herver *v.* Dowson, Bull. N. P. 8.; see note 2, p. 383, *ante*.) The publication being confidential is not of itself a defense. (Byam *v.* Collins, 111 N. Y. 143.)

that he was a rogue, &c. At this time there was a balance due defendant from plaintiff for beer, in respect of which L. was liable on his guaranty. Lord Ellenborough inclined to think the communication conditionally privileged; he refused, however, to nonsuit the plaintiff, and a juror was withdrawn.[1] Plaintiff was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. Afterwards a vacancy occurred in the situation of engineer to the commissioners for improving the river Wear, and the plaintiff became a candidate. The defendant wrote to C. introducing D. as a candidate, and C. having written defendant informing him that another person [the plaintiff] had succeeded in obtaining the appointment, the defendant wrote an answer to C. reflecting on the conduct of the plaintiff whilst superintendent of the railway works. It appeared that defendant and C. were both shareholders in the railway company, and that defendant managed C.'s affairs in the railway. Held not a privileged publication.[2]

§ 241 *a*. A party is justified in giving his opinion *bona fide* of the respectabilty of a tradesman *in answer to an inquiry concerning him;*[3] thus it is said that the owner of a public house cannot maintain an action against a neighboring publican for giving a bad character of such house to a person who, being in treaty for purchasing it, applied to the defendant for information, provided (as is stated) there is some evidence of the truth of the assertion.[4] In

[1] Dunman *v.* Bigg, 1 Camp. 269; and see Rex *v.* Jenneaur, 3 Bac. Abr. tit. Libel, 452; 2 Brownl. 151; 2 Burns' Eccles. Law, 179; Wilson *v.* Stephenson, 2 Price, 282.

[2] Brooks *v.* Blanshard, 1 Cr. & M. 779.

[3] Storey *v.* Challands, 8 C. & P. 234; generally otherwise when there is no inquiry (*Id.*), but it depends upon the circumstances.

[4] Humber *v.* Ainge, Manning's Index, tit. Libel. pl. 13. Where a person authorized to make a privileged communication stated false matter, and the court left it to the

an action for slander by the plaintiffs, bankers at M., the charge was that in answer to a question from one Watkins, whether he [defendant] had said that plaintiffs' bank had stopped, defendant's answer was, "It was true; he had been told so." The proof was that Watkins met defendant and said, "I hear that you say the bank of B. & S. [plaintiffs] has stopped. Is it true?" Defendant answered, "Yes, it is; I was told so," and added, "It was so reported at C., and nobody will take their bills, and I have come to town in consequence." Watkins said, "You had better take care what you say; you first brought the news to town and told Mr. John Thomas of it." Defendant repeated, "I was told so." It further appeared that defendant had in fact been told there was a run on plaintiffs' bank, but not that it had stopped, or that nobody would take the plaintiffs' bills. It was held on the trial that the publication of the words alleged was proved, and the jury were instructed that if they thought the words were not spoken maliciously, the defendant ought to have a verdict. The jury found for the defendant. On plaintiffs' motion a new trial was ordered. On granting the new trial, the court discussed at length the question of malice, and the supposed distinction between malice in fact and malice in law,[1] and stated that there was no instance of a verdict for the defendant on the ground of want of malice,[2] held, that instead of instructing the jury that if the words were not spoken maliciously, they should find for the defendant, it should have been left to the jury as a previous question whether the defendant understood Watkins as asking for information for his own guidance, and that

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jury to say whether, "in communicating what he had heard and believed to be true," he acted in good faith, and there was no evidence that he had heard anything, nor none as to how he believed, it was held to be error. (Wakefield *v.* Smithwick, 4 Jones' Law [N. Car.], 327; but see Clarke *v.* Molyneux, 3 Q. B. Div. 237 [C. A.].)

[1] See *ante*, note 3, p. 67.

[2] See *contra*, Wilson *v.* Stephenson, in note 2, p. 69, *ante*.

defendant spoke what he did merely out of honest advice to regulate the conduct of Watkins, then the question of malice in fact would have been proper as a second question to the jury, if their minds were in favor of the defendant upon the first. . . In granting a new trial the court does not mean to say that it may not be proper to put the question of malice as a question of fact for the consideration of the jury; for if the jury should think that, when Watkins asked his question, the defendant understood it as asked to obtain information to regulate his (Watkins') conduct, it will range under the cases of privileged communications, and the question of malice in fact will then be a necessary part of the jury's inquiry; but it was not left to the jury to consider whether the question was understood by the defendant as an application for advice, and if not so understood the question of malice was improperly left to the jury.[1] A bank officer may properly show to one who inquires of him as to the standing of a merchant who has had business relations with the bank, letters which the former has received impugning the credit of the latter, and even an anonymous letter received so long as a year previously. Although the bank officer had no legal duty cast upon him to give the opinion, unless actuated by malice, he may tell what he knows; and although an anonymous letter is usually a very despicable thing, anonymous letters may be very important, not by reason of what they say, but because they lead to inquiry which may substantiate what they have said. Hence, one to whom inquiries are addressed may, in good faith, show for what it is worth an anonymous letter he had received.[2] Where a party interested in a building contract, on which the plaintiff had been engaged, applied to the defendant to recommend a surveyor to measure the work, when the

[1] Bromage *v.* Prosser, 4 B. & C. 247; 6 Dowl. & R. 296.

[2] Robson *v.* Smith, 38 Law Times, N. S. 423.

defendant stated that he had seen the plaintiff take away some of the materials, upon which the plaintiff's employer inquired of the defendant if he had seen plaintiff taking them away, when he alleged that he had seen the plaintiff taking them, and that he hallooed to him; held, that the judge properly directed the jury to say, first, whether the words imputed felony; and secondly, that even if they did the plaintiff was not entitled to recover, unless malice was expressly shown, or the jury believed, from the circumstances, that the defendant was actuated by malicious motives.[1] Where A. had sold goods to B., and afterwards, and before the delivery of the goods, C., *without* being asked or solicited in any way to do so, made representations to A. injurious to the credit of B., the representations were held not to be privileged, because made without any previous request.[2] And where A., seeing that apartments were to let at a house occupied by B., inquired who was the landlord, of C. (a neighbor of B.'s); C. told him, and added that B. had not paid his rent, and that if A. moved in his goods they would be seized. B. having sued C. for slander, the judge, at the trial, told the jury "he thought it was a privileged communication by C., unless they were of opinion it was made maliciously; that the question for them was, did the defendant honestly believe, at the time he spoke the words, that the statement contained in them was true, or was he actuated by malice in making such statement?—held that there was no misdirection. But the court granted a new trial, not being satisfied of the fact whether C.'s statements were made officiously or in answer to A.'s inquiries.[3] The plaintiff was foreman to one Bryer, a bone merchant. In October, 1865, defendant gave Bryer an order for 100 quarters of

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[1] Kine *v.* Sewell, 3 M. & W. 297.
[2] King *v.* Watts, 8 C. & P. 614; and see Pattison *v.* Jones, 3 M. & R. 101.
[3] Chapman *v.* Wright, 1 Arn. 241.

sheep's hoofs. Plaintiff by mistake delivered 120 quarters. On the day following the delivery, plaintiff informed a clerk of the defendant of the mistake, and made an additional charge in defendant's account. In September, 1866, defendant called on Bryer, and said, "I lay 20 quarters of sheep's hoofs to your foreman and my clerk. There was an overture made by your foreman to divide the price of the 20 quarters, and pocket the money between them. It has been on my mind some time, and it is best to let you know it. Your foreman made improper overtures to my clerk to get the money for those 20 quarters and divide whatever the amount was." This was held to be privileged.[1] Whether a caution not to trust another, *bona fide* given to a tradesman, *without any inquiry on his part*, is a privileged communication, was discussed in Bennett *v.* Deacon,[2] and it was held by Tindal, Ch. J., and Erle, J., that it was, and by Coltman and Cresswell, JJ., that it was not. The effect of a previous inquiry was very elaborately discussed in a case where C., the mate of a ship, wrote to the defendant, falsely charging his captain (the plaintiff) with having endangered the vessel and lives of the crew by continued drunkenness. The vessel was at this time in port, and likely to continue there a few days. The defendant, who was slightly acquainted with the owner of the vessel, but was not interested in the vessel, and had no inquiry made of him, believing in the truth of the letter, showed it to the owner, who, in consequence, dismissed the captain. In an action for libel by the captain, upon these facts appearing on the trial, the chief justice directed the jury that if the defendant acted honestly and *bona fide*, the publication was justifiable, and their verdict must be for the

[1] Caulfield *v.* Whitworth, 18 Law Times, N. S. 527.

[2] 2 Com. B. 628; and see Lewis *v.* Chapman, 16 N. Y. 369; Hart *v.* Wall, 45 Week. Rep. 372.

defendant; if otherwise, for the plaintiff. The jury found a verdict for the defendant. On a motion for a new trial, after the case had been, at the request of the court, twice argued, held, by Tindal, C. J., and Erle, J., that the publication was justifiable, and that the direction to the jury was right; per Coltman, J., and Cresswell, J., that the direction was wrong; the court being equally divided, the motion for a new trial was denied, and the defendant had judgment.[1] Where W. went to inquire of defendant the address of plaintiff, who had previously been a tenant of the defendant, in the course of a conversation which ensued, defendant spoke disparagingly of the plaintiff,

[1] Coxhead *v.* Richards. 15 Law Jour. R. 278, C. P.; 10 Jur. 984: 2 C. B. 569. In our opinion, the Chief Justice and Justice Erle were right, and Justices Cresswell and Coltman wrong, and of the like opinion were the court in Davis *v.* Reeves (5 Ir. Com. Law Rep. 79). In Leutner *v.* Mirfield, before Lord Coleridge, April 30, 1880, his Lordship expressed an opinion that the doctrine of privilege had, since Coxhead *v.* Richards, been carried too far, and that he was inclined to adopt the views of Coltman and Cresswell, JJ., in that case. The ruling of Coleridge, J., in Leutner *v.* Mirfield, was upheld on appeal. (69 Law Times, 20.) The importance of the principles involved justifies the reiteration of our conclusion that the material question in such a case is, Was the communication made *bona fide* to protect the interests of the person spoken to, without regard to its effect upon the party spoken of, and without any ill-will towards or desire to injure the person spoken of? If yea, it is privileged, and the absence or presence of a previous request is only material as evidence of the intent. This is conceded to be the law in the case of an employer giving what is termed a character to an ex-employee, and we shall show (§ 245) this latter act comes within the general rule of a communication made to protect the interests of the person to whom the communication is made. On the argument of Coxhead *v.* Richards (2 C. B. 591), Sir T. Wilde, for the plaintiff, says: "The cases as to characters of servants are not in point. Judges may have been wrong in supposing that a former master stands in a peculiar position. *It may be said that the servant authorizes the master to libel him*" (note to § 245, *post*). But, right or wrong, the cases proceed upon that distinction. (Erle, J.: In those cases it is perfectly immaterial whether the party was a volunteer, the sole question is, whether the information was given honestly and *bona fide*. Cresswell, J.: Mr. Justice Bayley deals much more clearly with the principle upon which this class of cases proceeds than Lord Tenterden does, in Pattison *v.* Jones.) And at page 609, Erle, J., denies that the relation of master and servant is the material one in cases of privileged communication. The action of the defendant in the case now before us seems to be as consistent with a natural and praiseworthy impulse to protect the interest of the ship owner, and to protect the lives of the persons committed to the plaintiff's care, as with a desire to injure the plaintiff, and should not be considered as by itself evidence of malice. (*Ante*, note 4, p. 403.)

and although W. told defendant he did not come to inquire into plaintiff's character, but only to obtain his address, defendant continued to speak concerning the plaintiff, and used words imputing that he was a swindler, but added that he spoke *in confidence;* in an action for these words alleging special damage, it was held proper to leave it to the jury to say whether defendant acted with malice or *bona fide* for the purpose of putting W. on his guard.[1] The defendant being tenant to A. of a house, B., the agent of A., directed the plaintiff to do some repairs at the house. The plaintiff did the repairs, but in a negligent manner, and during the progress of the work got drunk; circumstances occurred which induced the defendant to believe that the plaintiff had entered his (defendant's) cellar, and taken his cider deposited there. Two days afterwards, defendant met the plaintiff in the presence of D., and charged him with having got drunk and spoiled the work, and broken into his (defendant's) cellar. The defendant afterwards told D., in the absence of plaintiff, he was certain plaintiff had broken open the door. On the same day, the defendant complained to B. that plaintiff had been negligent with the work, had got drunk, and, as he thought, had broken open his cellar door. In an action of slander for these three several publications, held, that the first and third publications were conditionally privileged, and the second was not privileged.[2] Where the defendant, a son-in-law, addressed a letter to his mother-in-law, about to marry the plaintiff, containing slanderous imputations against him: held, that the occasion justified the writing, and that the jury were to say whether the defendant acted *bona fide*, and under *a belief of the truth*, although the imputations were false, and that such communications were to be regarded liber-

[1] Picton *v.* Jackman, 4 C. & P. 257.

[2] Toogood *v.* Spyring, 1 Cr. M. & R. 181; 4 Tyrw. 582.

ally, unless a clearly malicious intention was manifest in the act.[1] That the defendant knew of the falsity of the charge published, is a fact from which malice may be inferred.[2] A letter to a woman containing defamatory matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents.[3] So if one not having been inquired of, write to the family of a woman that the man she is about to marry has been imprisoned for larceny, the communication is not privileged.[4] A. and defendant, two unmarried women, were intimate friends. A. said to defendant, you have a brother and I have you; you are more likely than I to get information concerning young men, and if you learn anything of any man I go with, let me know. Four years after this, A. went with plaintiff, a lawyer. Defendant wrote A. several defamatory things concerning plaintiff. In an action by plaintiff,

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[1] Todd *v.* Hawkins, 8 C. & P. 88; 2 M. & Rob. 20. The court having instructed the jury "that confidential communication, made in the usual course of business, or of domestic or friendly intercourse, should be liberally viewed by juries," held that the charge was right. (Stallings *v.* Newman, 26 Ala. 300.) A grand jury had an indictment for theft of money before them, and a brother of the man who had lost the money, returning from the court, stated that fact in answer to inquiries made of him, and said that the general opinion was, that, if a certain person swore what he had stated, the accused would be convicted. This brother was afterwards sued for slandering the accused, by saying that "he believed he stole the money," and it appeared that the words laid in the declaration, if spoken at all of the plaintiff, were spoken in a private conversation with a brother of the defendant, both being brothers of the man whose money had been stolen, and were overheard by one who had been employed to listen. Held, that the occasion, and the relationship between the parties, afforded a *prima facie* justification, sufficient to defeat the action, in the absence of any other proof of malice than what arose from the mere speaking of the words. (Faris *v.* Starke, 9 Dana, 128.)

[2] Hartwell *v.* Vesey, 3 Law Times, N. S. 275; Harwood *v.* Keech, 6 Sup. Ct. Rep. (T. & C.) 665; 4 Hun, 389; see *post*, § 389; *ante*, note 2, p. 399.

[3] Joannes *v.* Bennett, 5 Allen (Mass.), 169; and see Rosbotham *v.* Campbell, 5 Ir. Jur. N. S. 243.

[4] Krebs *v.* Oliver, 12 Gray, 239. When A., a relative of defendant, was about to marry one C., the defendant wrote a letter to B., a sister-in-law of A., containing defamatory matter concerning C., and requesting B. to repeat such matter to A, held privileged. (Atkinson *v.* Congreve, 7 Ir. Com. Law Rep. 109; *post*, p. 411, notes 1, 2.)

based on this letter, held, one judge dissenting, the letter was not privileged.[1] Where the wife of A., prior to her decease, made a request to B., after her (A.'s) decease, to look to and advise her daughters. The wife of A. died, and he remarried. B. told the daughters of A.'s deceased wife that their step-mother was a loose woman, and that they ought to leave their home; this was held to be a privileged publication.[2] The plaintiffs, printers at M., had been employed by the defendant, the deputy clerk of the peace for the county of K., to print the register of electors for the county, the expense of which was defrayed from the county rate, and allowed by the justices at quarter sessions; afterwards the defendant employed another printer, who agreed to do the work at a lower rate than that which the plaintiffs required, and he wrote a letter to the "finance committee" appointed to superintend such expenses, in the conclusion of which he imputed improper motives to the plaintiffs in the demand which they made, and characterized their demand as "an attempt to obtain a considerable sum of money from the county by misrepresentation." In an action for libel, it was held that the occasion of writing the letter *prima facie* rebutted the presumption of malice, but that it was a question for the jury whether the sentence complained of as exceeding the privilege was evidence of malice.[3] The defendant, *bona fide* believing that the plaintiff, who was a clerk to one M., a customer of the defendant, and who had been sent to the defendant's shop by M., had, while there, stolen a box from an inner room, went to M., and, after telling him of his loss intimated his suspicion of the plaintiff, saying, "There was no one else in the room, and he must have taken it." Held, that the

[1] Byam *v.* Collins, 111 N. Y. 143; rev'g 39 Hun, 204.

[2] Adcock *v.* Marsh, 8 Ired. 360. Report of persons employed by plaintiff's wife's father to make inquiries about him made to her mother, held, conditionally privileged. (Atwill *v.* McIntosh, 120 Mass. 177.)

[3] Cooke *v.* Wildes, 5 El. & Bl. 328; 24 Law Jour. Rep. N. S. 367 Q. B.; 1 Jur. N. S. 610.

communication was privileged by the occasion.[1] A letter written to B., concerning the plaintiff, who was steward of B.'s estate, was held to be privileged.[2] A communication made by one subscriber to a charity to another subscriber to the same charity, respecting the conduct of the plaintiff, the medical attendant in the employ of such charity, held not to be privileged.[3] Where the alleged libel was contained in a handbill offering a reward for the recovery of bills, and stating that the plaintiff was believed to have embezzled them; held, that if done with the view solely to protect persons liable on the bills, or for the conviction of the offender, it was a good defense; and that, in order to show the *bona fides* of the defendant, evidence of his having preferred a charge of the same nature against the plaintiff was admissible.[4] A communication by a landlord to his tenant, respecting the conduct of sub-tenants, or persons in the employ of the tenant, is conditionally privileged; as where the defendant complained to E., his tenant, that her lodgers, of whom the plaintiff was one, behaved improperly at the windows, and he added that no moral person would like to have such people in his house.[5] So communications made by an employer to his employee, or by an employee to his employer, are conditionally privi-

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[1] Amann *v.* Damm, 8 C. B. N. S. 597.

[2] Cleaver *v.* Sarraude, cited 1 Camp. 268, note

[3] Martin *v.* Strong, 5 Adol. & El. 535; 1 Nev. & P. 29. A letter written by the defendant, a subscriber to a charity, to the managing committee, impugning the moral character of the plaintiff, the secretary of said charity, in reference to a person whom defendant has recommended as matron; and a second letter by the defendant to said committe, in answer to inquiries made by them, and also oral statements made by the defendant to said committee, were held to be privileged if made with an honest and reasonable belief of their truth. (Maitland *v.* Bramwell, 2 Fost. & F. 623; and see Lawless *v.* Anglo-Egyptian Cotton Co. Law Rep. 4 Q. B. 262.)

[4] Finden *v.* Westlake, Moo. & Malk. 461. An advertisement in a newspaper, warning the public against negotiating certain notes which had been obtained from their alleged owner by fraud or theft, is privileged. (Commonwealth *v.* Featherston, 9 Phila. [Pa.] 594.)

[5] Knight *v.* Gibbs, 3 Nev. & M. 467; 1 Adol. & El. 43. Besides that the tenant was interested to know the character of her lodgers, the defendant was interested to maintain the reputation of his house.

leged in certain cases. Thus, defamatory words spoken by an employer to his overseer, intended to protect the employer's private interests and property, spoken without malice, were held privileged.[1] So where the plaintiff was a wine merchant, and the defendant the surgeon to a poor law union. The plaintiff made a proposal to supply wine for the use of the sick paupers, defendant advised the board of guardians not to accept plaintiff's proposal, alleging that the wine which plaintiff would supply would not be of the kind represented. Defendant's language was held privileged.[2] The communicaton of an agent to his principal, touching the business of his agency, and not going beyond it, is privileged, and is not actionable without proof that the defendant did not act honestly and in good faith, but intended to do a wanton injury to the plaintiff.[3] The defendants, bankers at L., received from C. & Co., of Y., for collection, a note drawn by plaintiffs, merchants at L.; the plaintiffs took up the note at maturity, the 19th of April, by giving a draft on defendant's bank, in which they kept their account. The draft overdrew the plaintiff's account, but was accepted by a clerk of the defendant, who, in reply to an offer of one of the plaintiffs to transfer an amount standing to his individual credit sufficient to meet the check, declared that to be unnecessary. The plaintiffs' account was made good on the 25th day of April, and on the 28th of April defendants remitted to C. & Co. the amount of the note, and added a postscript: "Confidential. Had to hold over a few days for the accommodation of L. & H."—the plaintiffs. On the trial, there was no evidence as to malice; the plaintiffs had a verdict on which judgment was entered, and the case went to the Court of Appeals, where the judgment

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[1] Easley *v.* Moss, 9 Ala. 266.
[2] Murphy *v.* Kellett, Ir. Rep. 13 Com. Law, 488.
[3] Washburn *v.* Cooke, 3 Denio, 110.

was reversed, and a new trial ordered; and the court said, "Assuming that the defendant made the communication in perfect good faith, as we must on this question of privilege, his act was not to be deemed officious, as it related to the very business with which he was intrusted."[1] The sheriff levied upon certain cattle of W., and they were wrongfully driven away, whereby he was likely to be damnified; he employed C., a law student, to ascertain the facts, and to advise what course it was best to pursue; held, that C.'s letter to the sheriff, stating facts implicating W., and advising his arrest for larceny of the cattle, was privileged.[2]

§ 241 *b*. The communication of a pastor to his parishioners, relating to matters not spiritual, is not necessarily privileged; as where the plaintiff, who had been for twenty years schoolmaster at the national school of the adjoining parishes of C. & I., of which the defendant, the rector of C., and another person, the vicar of I., were trustees, was requested by the defendant to undertake the Sunday school of his parish; he declining to do so, was removed from the mastership of the national school; he afterwards, intending to gain a livelihood by it, set up a school in the defendant's parish, in a school-room used as a dissenting chapel. In a letter addressed to his parishioners, the defendant told them that the plaintiff's attempt betrayed a spirit of opposition to authority, and justified the managers of the national school in removing him; that "no rightly-disposed Christian, who received in simple faith the teaching of inspiration, 'Obey them who have the rule over you, and submit yourselves,' could expect God's blessing to rest upon such an undertaking," and warned them against countenancing it, either by subscriptions or sending their children to it for instruction; that it would

[1] Lewis *v.* Chapman, 16 N. Y. 369; rev'g 19 Barb. 253.

[2] Washburn *v.* Cooke, 3 Denio, 110.

be a schismatical school, and those who aided the plaintiff in any way would be partakers with him in his evil deeds; they were to mark them which cause divisions and offenses, and avoid them, &c. On the trial, the presiding judge held the communication a privileged one, and in the absence of any evidence of malice, ordered a verdict for the defendant; on motion for a new trial, this direction was held erroneous, and that the jury should have determined whether the publication was not malicious on its face.[1]

§ 241 *c.* A customer may in *good faith* complain to a tradesman with whom he deals of anything he may deem irregular or dishonest in the conduct of such tradesman towards him (the customer); as where the plaintiff, a butcher, sold meat to the defendant, and defendant afterwards called at plaintiff's shop, and, in the presence of several of his customers, said: "I intended to have dealt with you, but shall not do so, for you changed the lamb that I bought of you for a coarse piece of mutton." Held that if the statement was made in good faith, it was privileged.[2] And where the defendant, a customer of the plaintiff, a corn dealer, went to the place of business of the plaintiff, and

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[1] Gilpin *v.* Fowler, 9 Ex. 615; 23 Law Jour. Rep. N. S. 152, Ex.; 18 Jur. 292; see § 399, *post.* There are in Scotland many reported cases of the recovery of damages against ministers of the Gospel, for words spoken in the pulpit. (See 2 Shaw's Digest, 1613, tit. Reparation; and 10 Alb. Law Jour. 240, art. "Privilege of the Pulpit." See *ante,* p. 195, n. 6, p. 199, n. 8, and Messire *v.* Blanchard, Ramsey's App. Cases, 421; McGrath *v* Finn, 11 Ir. L. Times R. 103; 16 Alb. L. J. 186.) A Hebrew butcher, named Schott, complained that after having opened a shop in Whitechapel, where he had obtained a considerable business amongst persons of his own persuasion, the defendant, Chief Rabbi, had not only refused to sanction his selling meat to Jews, but had employed emissaries to warn his customers that what he sold was common and unclean. As a consequence he lost his business. The judge ruled that there was no evidence to go to the jury, and even had there been any proof of the alleged slander, he should have told the jury that the communication was privileged.

[2] Crisp *v.* Gill, 29 Law Times, 82. A dealer in paints, who sells them upon condition that they be used without adulteration, may in good faith complain of one whom he suspects of adulterating his paint. (Lynch *v.* Febiger, 39 La. Ann. 336.)

using abusive language to plaintiff in a loud and angry tone of voice, said, among other things: I know all about you and your family, and you have robbed me ever since I have dealt with you. Held that the jury were to determine, from the language used, and from the tone and manner in which it was used, whether the defendant was merely in good faith making a complaint concerning a supposed wrong done him, and if so, it was privileged; that making the complaint in a loud voice, and in abusive terms, outside of the plaintiff's shop or in the presence of third parties, were circumstances from which the jury might infer malice; and if the statement was made maliciously, it was not privileged.[1]

§ 242. When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relative to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the original interview; and it is a question for the jury whether any future communication on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between the parties, and therefore entitled to the same protection.[2]

§ 243. Where a publication would be privileged if made, and because made to some certain person, the privilege may be forfeited by the publication being made to some other person; as where C. was employed, for compensation, by certain merchants in New York, in obtaining information concerning the business character

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[1] Oddy *v.* Paulet, 4 Fost. & F. 1009; Kent *v.* Bongratz, 20 The Reporter, 570.

[2] Beatson *v.* Skene, 5 Hurl. & N. 838; see *ante*, note 4, p. 379.

and standing of their customers, and others in other States, doing business in New York. He wrote for their use, from the residence of T. & Co., a letter unfavorably representing them, and on his return had it and similar letters printed in a pamphlet, which he gave privately to his employers *and others*, some of whom had dealt with T. & Co. Held, that although the publication might have been privileged if made only to such of his employers as were interested in the pecuniary standing of T. & Co., the privilege was lost by the publication being made to other persons.[1] And so held of a circular letter sent by the secretary of a society for the protection of trade to the members of such society.[2] A communication

[1] Taylor *v.* Church, 1 E. D. Smith, 279; 8 N. Y. 452; Cook *v.* Hill, 3 Sandf. 341; Bradstreet *v.* Gill, 9 So. West. Rep. 757; 39 Alb. L. J. 216; Locke *v.* Bradstreet Co. 22 Fed. Rep. 771; Erber *v.* Dun, 12 *Id.* 526; Trussell *v.* Scarlett, 18 *Id.* 214; State *ex rel.* Lanning *v.* Lonsdale, 48 Wis. 348; King *v.* Patterson, 49 N. J. L. 417, a very elaborately considered case; Holmes *v.* Harrington, 3 West. Rep. 296; Eaton *v.* Avery, 83 N. Y. 34. In the case last cited Rapallo, J., said: The court will take judicial notice of "the business and office" of "commercial agencies." "They are so well known, and have been so often the subject of discussion in adjudicated cases, that the court can take judicial notice of them." "A commercial agency is a lawful business, and when conducted lawfully is a benefit to society and trade; but no just reason can be given for a rule that would exempt it from liability for a false and defamatory publication, when other citizens would not be exempt. . . . It is not entitled to any privileges denied the ordinary citizen."

In Todd *v.* Dunn, Court of Appeals, Toronto, January 11, 1888, held that communications between a commercial agency and its correspondents were privileged, as were reports by the agency to its subscribers. In O'Connell *v.* Manhattan Commercial Agency (N. Y. Times, March 6, 1884), the agency had reported to one of its subscribers that plaintiff was not trustworthy, in consequence of which he was refused credit. Plaintiff failing to prove malice, Judge Brown, U. S. Circuit Court, Brooklyn, dismissed the complaint. A letter of inquiry by a commercial agency to a creditor of plaintiffs held privileged. (Newell *v.* How, 31 Minn. 235.) In Christ *v.* Bradstreet Co. 15 West. Law Bul. 334, held that publications by the agency to its subscribers, in good faith, were privileged.

[2] Getting *v.* Foss, 3 Car. & P. 160. Where the defendant kept a mercantile agency, whose business it was to obtain information respecting the credit and responsibility of persons in business, and to furnish the same to subscribers to his agency, it was held that a communication made in *good faith* to a subscriber to such agency was privileged. "The business in which the defendant was engaged is sanctioned by the usages of commercial communities." (Ormsby *v.* Douglass, 37 N. Y. 477.) In Sherwood *v.* Gilbert (2 Albany Law Jour. 323) it was ruled at the circuit that the privilege accorded to a mercantile agency, as laid down in Ormsby *v.*

which would be privileged if made to A. only forfeits the privilege if made to A. through the "postal telegraph" or "postal card." It is published to strangers in reaching its destination.[1] Circumstances may make a telegram privileged, but nothing can excuse a postal card.[2] With regard to the report by the officers of a corporation to the stockholders, of the result of their investigation into the conduct of their officers and agents, with their conclusions upon the evidence collected by them, it was held to be a privileged communication, but that the privilege extended only to making the report, and not to the preservation of it in the form of a book for distribution among the stockholders and in the community.[3] And where the defendant published an advertisement calling a meeting of the creditors of the plaintiff, and in addition defamatory remarks concerning the plaintiff, the publication was held

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Douglass, does not extend to the country correspondents of the agency. The circular of a mercantile agency, issued to their subscribers generally, is not privileged, although a publication by such an agency to persons having dealings with plaintiff would be privileged. (Commonwealth *v.* Stacey, 1 Leg. Gaz. Rep. [Pa.] 114; Sunderlin *v.* Bradstreet, 46 N. Y. 188.) In Beardsley *v.* Tappan (5 Blatch. C. C. 497) it was held that a communication by the proprietor of a mercantile agency, *through his clerks* to his customers *and their clerks*, was not privileged. In that case the plaintiff had a verdict for $10,000. A motion for a new trial was made before Justice Nelson, and denied. The defendant appealed to the United States Supreme Court, where the judgment was, December, 1870, reversed on a collateral point.

In the defendant's brief in Tappan *v.* Beardsley it was said that only thirteen suits and one prosecution against mercantile agencies for libel had been instituted up to that time, A. D. 1870, and of these, the prosecution and two suits were then pending, and the residue of the suits were either abandoned or had resulted in favor of the defendants. Billings *v.* Russell (8 Boston Law Rep. N. S. 699 [A. D. 1851]) was the first reported case for libel against a mercantile agency.

[1] A publication, otherwise privileged, loses its privilege by being sent by postal card or by telegraph. Williamson *v.* Freer, L. R. 9 C. P. 393.

[2] Robinson *v.* Jones, L. R. Ir. Q. B. C. P. & Ex. D. 391; 20 Alb. L. J. 203. In that case defendant sent through the mail, directed to plaintiff, a postal card, upon which was written:

Dr. Robinson.

"To amount goods rendered.....	£1 16*s.* 2*d.*
By post-office order on account.....	£1 8*s.* 1*d.*
	8*s.* 1*d.*

Sir, your plea of illness for not paying this trifle is mere moonshine," &c. T. Jones & Sons. See note to page 82, *ante*.

[3] Phil. R. R. Co. *v.* Quigley, 21 How. U. S. Rep. 202; see Koenig *v.* Richie, 3 Fost. & F. 413.

not to be privileged, because the meeting of creditors might have been called in a less public manner.[1] Where the plaintiffs were contractors for the erection of a borough jail, and the defendants were members of the town council; the defendants, from their business, were competent judges of the work, and they published, in a local newspaper, a letter charging the plaintiff with omissions and deviations from their contract—in an action for libel, it was held that although the charges contained in the letter would have been privileged if made by the defendants to the town council, they were not privileged when published in a newspaper.[2] And although a bank director may be privileged at a meeting of the board to speak of the credit of a merchant or customer of his bank, he is not privileged so to speak, even to a co-director, in any other place or at any other time than at such meeting during its session.[3] The publication, by the directors of an incorporated society for promoting female medical education, in their annual report, of a "caution to the public" against trusting a person who had formerly been employed to obtain and collect subscriptions in their behalf, but had since been dismissed, was held to be justified so far only as it was made

[1] Brown *v.* Croome, 2 Stark. Cas. 297.

[2] Simpson *v.* Downs, 16 Law Times, N. S. 391.

[3] Sewall *v.* Catlin, 3 Wend. 292. Plaintiff and one Taylor were co-directors of a joint stock company. Defendant stated to Taylor that plaintiff had been privy to the preparation and circulation of a false balance sheet of the affairs of the company. Defendant learned that he was the manager of, and a shareholder in said company, and having found the affairs of the company different from that represented in a balance sheet of the affairs of said company, published prior to his becoming manager, and that he refused to act further as manager unless furnished with means to carry on the business of the company; that the words were spoken believing them to be true, without malice, and in reference to the refusal of defendant to continue acting as manager, on demurrer the plea was held bad, as not showing a privileged occasion. Taylor was not shown to have any interest in the subject-matter, or duty in respect to it. (Waring *v.* M'Caldin, Ir. Rep. 7 Com. Law, 282.) The case was tried on the question of fact before the demurrer was argued, and on the trial it was shown the publication was to others besides Taylor, and that such others were in no wise interested; held, this did not divest the occasion of privilege. Plaintiff had a verdict for sixpence damages. Court refused to disturb it.

in good faith, and was required to protect the corporation and the public against false representations of that person; and that the questions, whether the directors had acted in good faith, and had not exceeded their privilege, were for the jury.[1] The plaintiff, having the defendant's bond, advertised it for sale; the defendant published a statement of the circumstances under which the bond had been given, with this conclusion: "His (plaintiff's) object is either to extract money from the pockets of an unwary purchaser, or, what is more likely, to extort money from me;" held not privileged.[2] A. understanding that B. imputed to C., a relative of A.'s, the passing to him of a piece of forged paper, told B., untruly, that he was authorized by C. to call upon him and investigate the matter, and B. thereupon repeatedly asserted C.'s guilt of the crime; held that these assertions were unnecessary and useless, and were not privileged, and it seems they would not have been privileged if A. had been C.'s agent to call upon B. for information.[3]

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[1] Gassett *v.* Gilbert, 6 Gray (Mass.), 94; see Hatch *v.* Lane, 105 Mass. 394; Holliday *v.* Ontario Farmers' Mut. Ins. Co. 33 Up. Can. Q. B. Rep. 558.

[2] Robertson *v.* McDougall, 4 Bing. 670; 1 Mo. & P. 692; 3 Car. & P. 259.

[3] Thorn *v.* Moser, 1 Denio, 488. The defendant had suspected, and declared his suspicion, that a person's wife had committed larceny; but, upon being inquired of by that person whether his suspicions continued, replied that he was now satisfied that A. B. (a hired maid) stole it. Held that if the communication was privileged at all, the defamatory matter, going further than to satisfy the inquirer that there was reason for the suspicion to cease, went beyond the exigency of the occasion. (Robinett *v.* Ruby, 13 Md. 95.) A., on an occasion when no third person was present, accused B. of stealing; afterwards a friend of B.'s called on A. and asked him if he had made such an accusation? A. answered, "Yes, and I believe it to be true." Held not privileged. (Force *v.* Warren, 15 Com. B. N. S. 806; and see Smith *v.* Mathews, 1 Moo. & Rob. 151; Griffiths *v.* Lewis, 7 Q. B. 61; 14 Law Jour. Q. B. 197; *contra*, see Billings *v.* Fairbanks, 136 Mass. 177 *infra*.) Plaintiff's daughter had been in defendant's service as a domestic servant. After the girl left, defendant's wife went to where the girl was staying and claimed some articles as her property, and as having been carried away by the girl. The girl told this to her father (the plaintiff), and he, with other relatives, went to defendant saying he had come to inquire about the charge against his daughter. Defendant said she had been stealing all the time she had been at his house. Plaintiff then inquired, why did you keep her in your service? Defendant answered that plaintiff was

§ 244. There are, however, some cases where the publication to others than those immediately interested or concerned does not forfeit the privilege;[1] as where a railroad employee having been discharged, asked the defendant, the general agent of the road, to inform him, plaintiff, the reason for his discharge. The agent answered on the spot, and in the presence and hearing of a number of persons, "You are discharged for stealing," etc.; this, there being no evidence of malice, was held privileged;[2] so where the plaintiff, a female, went to the store of the defendant to make a purchase, and after she left, the shopman, missing a roll of ribbon, supposed she had taken it, and so informed his employer, the defendant; the following day the plaintiff was passing the defendant's store; the defendant seeing her, called her in, and taxed her with the theft, which the plaintiff denying, the defendant detained her and sent for her father, and in his presence charged

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a thief, and that his family were all thieves, and were all tarred with the same stick; held this was not privileged, (Miller *v.* Johnston, 23 Up. Can. C. P. Rep. 580.) Where the plaintiff, a carpenter, was employed by a builder, and defendant imputed that plaintiff had, while so employed at one Burton's house, carried away some quarterings, the builder afterwards went to defendant and asked him did he say so? to which defendant replied, "Yes, I saw the man employed by you take from Burton's house two long pieces of quartering." Held proper to instruct the jury that the words were privileged unless spoken maliciously. (Kine *v.* Sewell, 3 M. & W. 297.) If one merely acknowledges to having made a statement concerning the plaintiff, such acknowledgment alone will not sustain an action, but it may be used as evidence of such former statement. (*Id.*; and see Burt *v.* McBain, 29 Mich. 260.) A friend of a person accused of stealing money from his employer went to him and was informed of ground of charge; the charge was repeated in the presence of accused. Held conditionally privileged. (Billings *v.* Fairbanks, 136 Mass. 177.)

[1] Where a defendant, intending to make a communication to A., which to him was privileged, by mistake made the communication to B.; held that the privilege was not thereby forfeited. (Tompson *v.* Dashwood, 11 Q. B. D. 43.) A notice posted in rooms set apart for railway servants, to which the public was not allowed access, though persons sometimes went in, that plaintiff had been dismissed from the Railway department, for insubordinate language to his superiors; held a privileged publication. (McDonald *v.* Board of Lands and Works, 5 A. J. R. 34; see Laughton *v.* The Bishop of Sodor & Man, Law Rep. 4 Pri. C. Cas. 495; Fahr *v.* Hayes, 50 N. J. L. 275; see § 246, *post*, Montgomery *v.* Knox, 23 Fla. 595.)

[2] Beeler *v.* Jackson, 2 Atl. Rep. (Md.) 916. Where one brings out the alleged slander by a question the answer is privileged. (Palmer *v.* Hummerston, 1 C. & E. 36.)

the plaintiff with stealing the ribbon; after some altercation the plaintiff was permitted to depart, and afterwards brought an action for slander, in which action it was held at *nisi prius* that the repetition of the charge to the plaintiff's father was, under the circumstances, a privileged publication.[1] Defendant was manager of a hotel in New York city, a guest of the hotel complained to defendant that plaintiff, a female servant in the hotel, had robbed him, the guest, of a piece of jewelry. Defendant sent for plaintiff, and in the presence of a fellow servant, but under whose authority, to some extent, plaintiff was, told plaintiff of the accusation made against her, for this plaintiff brought an action of slander against defendant; held, in the absence of malice, defendant was not liable.[2] And where, in an action for slander, it appeared that the defendant, in the presence of a third person, not an officer of justice, charged the plaintiff with having stolen his property, and afterward repeated the charge to another person, also not an officer, who was, with the consent of the plaintiff, called in to search him, held the charge was privileged if the defendant believed in its truth, acted *bona fide*, and did not make the charge before more persons or in stronger language

[1] Fowler *v.* Homer, 3 Camp. 294, and *ante*, note 2, p. 386; also Toogood *v.* Spyring, 1 Cr. M. & R. 181; 4 Tyrw. 582; Manby *v.* Witt, 18 C. B. 544; Taylor *v.* Hawkins, 16 Q. B. 308; Billings *v.* Fairbanks, 136 Mass. 177. Words spoken by the defendant which relate to a subject-matter in which he is immediately interested, and are said for the purpose of protecting his own interest, and in the full belief that they are true, are privileged communications, though made in the presence of others than the parties immediately interested; and it is incumbent on the plaintiff to show malice, in fact, in order to recover. (Brow *v.* Hathaway, 13 Allen [Mass.], 239; see Davies *v.* Snead, Law Rep. 5 Q. B. 608.) Defendant, the manager of A.'s business, at the request of B., a former employee of A., wrote down a confession by B. of having robbed A., this confession implicated plaintiff, a former employee of A.'s, in the robbery. This confession was written in presence of B., A., defendant, defendant's wife, and C., a person also in A.'s employ. In an action for libel A. recovered a verdict, on appeal; held that defendant had acted in the performance of a social duty, and that there being no inference of malice, the communication was privileged by reason of the occasion; held, also that the fact of defendant's wife and C. being present did not divest the privilege. (Jones *v.* Thomas, 53 L. T. N. S. 678.)

[2] Keene *v.* Sprague, 30 Alb. L. J. 283, City Co't. N. Y.

than was necessary.[1] Defendant, chief post office inspector, for Canada, was engaged under directions from the Post Master General, in inquiries into certain irregularities in St. John's Post Office. Alone in a room with plaintiff he charged plaintiff with abstracting missing letters, which plaintiff denied. Defendant then called in the assistant Postmaster and said, "I have charged Mr. W. with the abstraction from these money letters, and I have concluded to suspend him." Held privileged.[2] The fact that a communication, *prima facie* privileged, was made in the hearing of third persons not legally interested, will afford no evidence of express malice, when their presence appears to have been casual, and not sought for by the defendant.[3]

§ 244 *a*. When words imputing misconduct, of which two persons are alleged to have been jointly guilty, are spoken to one of them under circumstances which made the communication privileged as to him, the statement is privileged as to the other also, and the latter cannot main-

[1] Padmore *v.* Lawrence, 11 Ad. & El. 380; 3 Per. & D. 209. The plaintiff was the matron of a charitable institution; a charge being made against her, the defendant, the secretary of the institution, was appointed to investigate the truth of such charge; in the course of such investigation the defendant, in the presence of third parties, inmates of the institution, made defamatory statements concerning the plaintiff. Held to be conditionally privileged. (Wallace *v.* Carroll, 11 Ir. Com. L. R. 485.) We, the undersigned, who have been robbed and swindled by [naming the plaintiff and others], realizing that justice demands said parties should be punished for the offenses they have committed, hereby agree that we will bear equally all expenses, incurred in prosecuting said [naming plaintiff and others]. Defendants signed a writing on the above terms; held it was privileged, and held further, that the exhibition of said writing to the agents of the parties alleged to have been defrauded by plaintiff, for the purpose of procuring the signatures of the principals of such agents to said writing, was also privileged. (Klinck *v.* Colby, 46 N. Y. 428; see Vanderzee *v.* M'Gregor, 12 Wend. 545, page 386, *ante*.)

[2] Dewe *v.* Waterbury, 6 Canada Supreme Ct. Rep. 143, Ontario.

[3] Fahr *v.* Hayes, 50 N. J. L. 275. Defendant told his late servant he suspected her of stealing, and also stated his suspicion to an employment agent, through whom he had employed her, in consequence of which she lost the situation she then had. Held, conditionally privileged. (McDonald *v.* Ryland, 5 Legal Notes, 291.) Where defendant, plaintiff's employer, accused him of embezzlement. The accusation not appearing to have been made in reference to any investigation of plaintiff's accounts, held not privileged. (Brothers *v.* Fobes, 17 Week. Dig. 474.)

tain an action in respect of such statement; thus where it appeared that one Snead, the plaintiff, was an attorney and the legal adviser of the Rev. H. H., who was trustee for one widow D. and her children, and also rector of the parish in which defendant resided. During a visit H. H. paid to defendant, in the course of conversation and in the presence of other persons than H. H. and defendant, the defendant stated to H. H., "Your name is pretty well up in the town of Brecon. You and your scoundrel solicitor's names are ringing through the shops and streets of Brecon. You are spoken of as robbing the widow and orphans—you to build your church and he to marry his daughter." In an action by Snead, the court charged the jury that if there was express malice the action would lie, otherwise they might consider the communication privileged, provided that they were of opinion that the defendant was *bona fide* telling H. H. facts important for him to know, in order to clear his character. The jury negatived malice. A verdict was entered for plaintiff, with liberty to move to enter it for defendant. The court in banc held that, as the statement referred to both plaintiff and H. H. in such a manner as to be indivisible, and the part relating to H. H. could not be repeated to him without including the part affecting the plaintiff, the jury having negatived malice, the statement was privileged, and the verdict was ordered for the defendant.[1]

§ 244 *b*. Expressions in excess of what the occasion warrants do not, *per se*, take away the privilege, but such excess may be evidence of malice.[2]

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[1] Davies *v.* Snead, Law Rep. 5 Q. B. 608; and see Brow *v.* Hathaway, 13 Allen (Mass.), 239; Jones *v.* Thomas, 53 Law Times, N. S 678.

[2] Ruckley *v.* Kiernan, 7 Ir. Com. Law Rep. 75; Sutton *v.* Plumridge, 16 Law Times Rep. 741; Liddle *v.* Hodges, 3 Bosw. 537; Howard *v.* Sexton, 4 N. Y. 161; Fero *v.* Ruscoe, *Id.* 162; Garrett *v.* Dickerson, 19 Md. 418; Hotchkiss *v.* Porter, 30 Conn. 414; White *v.* Nicholls, 3 How. U. S. Rep. 266; Miles *v.* Weber, 6 Wyatt, Webb & A'Beckett, Law, 129. The case of Tuson *v.* Evans, 12 Adol. & El. 733, said to be overruled.

§ 245. There is a well-recognized right to what is termed "giving a character to a servant." This right may be thus described: An ex-employer may, without rendering himself liable in an action for slander or libel, in *good faith*, state orally or in writing, and as well without as with a previous request, all that he may *believe* to be true concerning his ex-employee. It appearing that the publication was made in what is termed "giving a character," the presumption is that it is made *bona fide*, and the burden is upon the plaintiff to show *malice* in the publisher, *i. e.*, either that he had an intent to injure the person spoken of, or that he did not believe in the truth of the statement published. Where no intent to injure exists, a belief in the truth of the language published is a legal excuse for making the publication; but where an intent to injure exists, a belief in the truth of the language published is not a legal excuse for making the publication. *Malice*, or a want of *good faith*, is established when it is shown that the matter published was false within the knowledge of the publisher; or malice may be established by showing a bad motive in making the publication, as that it was made more publicly than was necessary to protect the interests of the parties concerned, or that it contained matter not relevant to the occasion, or that the publisher entertained ill-will toward the person whom the publication concerned. Although the right now under consideration is one exercised in connection with the relation of master and servant, it does not, at least in the manner generally supposed, arise out of that relation, nor is the right restricted within the limits ordinarily assigned to it. The relation of master and servant, or of employer and employee, is one created by contract; with the determination of the contract the relation expires, and at the expiration of the relation cease all the rights and duties which, during its continuance, existed between the parties. Thenceforth the parties

occupy the same relative positions as if no contract of hiring and serving had ever been made. It cannot be that because A. has been in B.'s employ, B. thereby acquires a right to publish concerning A. anything he would not have been permitted with impunity to publish had such relation never existed. Hence the right now in review must rest on some other foundation, or arise in some other way than out of the mere fact that the person spoken or written of has been in the employ of the publisher.[1] On examination it will be perceived that this right of an *ex-employer* to give, as it is termed, a character to his *ex-employee* is nothing more than a consequence of the right to communicate one's belief, which is referred to and illustrated in a preceding section (§ 241). An employer is charged with the duty of exercising due care in the selection and retention of properly-qualified employees or agents, and is liable for all the acts of his employees done in his service.[2] In addition, the employer has more or less to trust the safety of his person and his property to the employee; the employer, therefore, is peculiarly interested to know the character and capacity of every person who either is already in his employ, or is desirous of entering his employ. The employer can obtain this knowledge only from the employee himself, or from information furnished by those to whom the employee may be known. To limit the source of this knowledge to the employee himself would manifestly, in the majority of cases, operate to prevent the obtaining any information worth the having; but because the employer is interested in knowing the character and

[1] That seems a monstrous proposition of Sir T. Wilde's, in the argument of Coxhead *v.* Richards (see *ante*, note 1, p. 408), that "the servant authorizes the master to libel him," and yet perhaps it is warranted by the reasoning in many decisions, and it is the only assumption for basing a distinction between the case of an ex-employer speaking of his ex-employee and the case of any other person (one not an employer) making a communication to a party interested.

[2] This does not mean *while* in the employer's service, but done in the execution of his proper duties as such employee. (See *ante*, note 2, p. 103.)

capacity of those in his employ, or who are candidates for employment by him, not a former employer only, but every one who honestly believes himself possessed of knowledge on the subject which the employer is interested to know, may, with or without a previous request, in good faith, communicate such, his belief, to the employer. In such cases, the communication is made not to promote the interest of the person making it, but either to serve the interests of the employer, or to injure the employee. No one is under any obligation to make such a communication; he does not owe it as a duty, either to the employer or the employee, to make any communication on the subject. Making the communication is the exercise of a right, and is optional (§ 39). This right is exercised under the double peril that, by speaking disparagingly of the employee, the speaker may be sued by the employee for slander, and by speaking approvingly of the employee he may be sued by the employer for misrepresentation.[1] Hence, usually, this right is exercised with reluctance, and, as where the communication is made without request, less evidence of ill-will may be required than in the case of a communication made upon a request,[2] it seldom happens that such communications are made without request; and because the character and capacity of an employee will be by no one so well known as by the one in whose service he has been, it happens the ex-employer is the person to whom, in the majority of instances, application will be made for information respecting the character and capacity of a candidate for employment, not because the ex-em-

[1] Defendant's letter of recommendation of the plaintiff, if untrue, would have rendered him liable to any one injured thereby. (Fowles *v.* Bowen, 30 N. Y. 20; and see Pasley *v.* Freeman, 3 Term R. 51.)

[2] "At all events, when he volunteers to give the character, stronger evidence will be required that he acted *bona fide* than in the case where he has given the character after being required so to do." (Littledale, J., Pattison *v.* Jones, 8 Barn. & C. 578.) A privileged communication need not necessarily be in reply to another; it may be original. (Ahern *v.* Maguire, Arm. Mac. & Og. 29.)

ployer is the only person having the right to give information, but because he is supposed to be better qualified than any other to give information on the subject. The exercise of this right should be encouraged, not only for the benefit of the employer, but of the employee; if the ex-employer refuses, as he lawfully may,[1] to answer any inquiries respecting his ex-employee, the probable inference is that he can say nothing favorable, and will not incur the risk of saying anything unfavorable—an inference which may be unjust to the ex-employee. These views have been expressed judicially as thus: "But the rule is general, and it seems to me to be quite a mistake to suppose that it is the privilege only of persons giving characters. There are two other classes of persons materially interested in the maintenance of the privilege—the person accepting characters and those of whom characters are given. It is a most important privilege for the encouragement of all honest servants. They are sufficiently protected against the abuse of it by that limitation of it to which all agree—that if a master, going beyond it, wantonly and maliciously makes a false statement as to the character of his servant, the express malice takes away all the privilege."[2]

§ 246. The subject of the preceding section (§ 245) is illustrated by the decisions to which we proceed to refer. Thus, it is said,[3] a *bona fide* character given of a servant that she was saucy, &c., if there be no malice (which must be directly proved), will not ground an action of slander, though the servant was prevented from getting a place thereby; and, though a letter giving a false character of a servant may be the ground of an action, yet, if written as

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[1] No action lies for refusing to give information as to the character or capacity of a former employee. (Carroll *v.* Bird, 3 Esp. 201.)

[2] Wightman, J., Gardner *v.* Slade, 13 Jurist, 828; 13 Adol. & El. N. S. 796; and see in note 1, p. 432, *post*, and Swadling *v.* Tarpley, in Appendix, *post*.

[3] Edmonson *v.* Stephenson, Bull. N. P. 8.

an answer to a letter sent, not with a view to obtaining a character, but with an intention of obtaining such an answer as should be the ground of an action, no action can be sustained.[1] A servant cannot maintain an action against his former master for words spoken or a letter written by him in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge, even though the master make specific charges of fraud. As where the plaintiff, who had been in the employ of the defendant, afterwards applied to one R. for employment. R. inquired of the defendant concerning plaintiff, and in consequence of what was told him by defendant, refused to employ plaintiff. Upon this C., plaintiff's brother-in-law, called upon the defendant for an explanation, and then the defendant wrote C., "Two days I gave him (plaintiff) money to go into the city and buy books. When he came home I desired him to reckon up his accounts; he did so. But being one day more curious than I sometimes was, I looked over his account, article by article, and in one book I well knew the price of I found he had charged me one shilling more than it cost, and that shilling he kept in his pocket," with statements of other frauds; on the trial the plaintiff had a verdict, subject to the opinion of the court on a special case; upon the argument of the case judgment was ordered for the defendant.[2] Where, in an action of slander, it appeared that the plaintiff had applied to the under-sheriff to be appointed an officer, the latter applied to the defendant as to the fitness of plaintiff, held that the answer of the defendant was conditionally privileged.[3] Where A. introduced the plaintiff to defendant, a ship's captain, who employed plaintiff as his mate, defendant afterwards dismissed plaintiff from his service, and wrote

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[1] King *v.* Waring, 5 Esp. 14.

[2] Weatherston *v.* Hawkins, 1 Term R. 110.

[3] Sims *v.* Kinder, 1 Carr. & P. 279.

A. that he had done so on account of the intemperate habits of the plaintiff, this was held a privileged communication.[1] The defendant being about to dismiss the plaintiff from his employ, called in a friend to hear what passed, and having dismissed the plaintiff, refused to give him a character, alleging to those who applied for information respecting the plaintiff, that he, defendant, had discharged the plaintiff for dishonesty. The plaintiff's brother afterwards inquired of the defendant why he had treated the plaintiff in such a manner, and that he (defendant) was keeping plaintiff out of employ. The defendant answered, "He has robbed me, and I believe for years past," adding that he concluded so from the circumstances under which he had discharged the plaintiff. Erle, J., said, "The calling in a witness was consistent with a wish to spread defamation; it was consistent also with the wish to do what a prudent man would desire to do. But if the effect of the evidence is equal both ways, the onus of proving malice lies upon the plaintiff. As to the words spoken to the plaintiff's brother, no malicious motive appears. The evidence, indeed, related to only one robbery, whereas the defendant spoke of having been robbed for years. But the communication was made in answer to an inquiry by the plaintiff's brother, and there are no circumstances to show that the extent of the statement actually made proceeded from malice, or went beyond what might be said by a person honestly wishing to tell the whole truth."[2] The plaintiff had been in the employ of the defendant, and dismissed on a charge of theft. Plaintiff afterwards went to defend-

[1] Tremaine *v.* Parker, 12 Law Times, 312. A letter addressed to a person on whose recommendation the writer had taken the plaintiff into his service, to the effect that his (plaintiff's) conduct had not justified the character given of him, and that he had left a balance unaccounted for, and that he ought not to be recommended for morality or honesty; this was held to be privileged. (Dixon *v.* Parsons, 1 Fost. & Fin. 24.)

[2] Taylor *v.* Hawkins, 16 Q. B. 308; 20 Law Jour. Rep. N. S. 313, Q. B.; 15 Jurist, 706; and *ante*, § 244.

ant's house to be paid his wages, and was in conversation with the defendant's servants, when the defendant, addressing his servants, said, "I discharged that man (the plaintiff) for robbing me; do not speak any more to him, in public or private, or I shall think you as bad as him." Maule, J., said, The evidence does not raise any probability of malice, and is quite as consistent with its absence as with its presence; and considering that the mere possibility of malice which is found in this case, and in all cases where it is not disproved, would not be sufficient to justify a finding for the plaintiff, it was right not to leave the question of malice to the jury.[1] A defendant who had dismissed two servants told one, in the absence of the other, You have both been robbing me; it was held conditionally privileged.[2] The plaintiff, being in the service of the defendant, was discharged without any previous notice, and the plaintiff, considering himself entitled to a month's wages, in lieu of notice, refused to quit the defendant's house until those wages were paid him, whereupon the defendant had the plaintiff removed by a police officer. The defendant called on one Holland, in whose employ the plaintiff had previously been, and complained of plaintiff, requesting Mr. Holland not to give plaintiff another character. Subsequently the plaintiff applied to Mr. Hand for employment, who inquired of defendant and received from him a letter, the material portion of which was as thus: "Rogers (the plaintiff) did not live with me six months, as he has told you, and I wish I had never taken him into my house, as he is a bad-tempered, lazy, impertinent fellow, and has given me a great deal of trouble. I was obliged to send for a police officer to put him and his things out of my house; as I look upon it, he will take any advantage he can." On the trial

[1] Somerville *v.* Hawkins, 10 C. B. 583; 15 Jurist, 450.

[2] Manby *v.* Witt, and Eastmead *v.* Witt, 18 C. B. 544; 25 Law Jour. 294, C. P.

the court left it to the jury to say if the defendant had acted maliciously; the verdict was for the plaintiff; leave was reserved to the defendant to move to enter a nonsuit. He moved, but his motion was refused.[1] Where defendant, plaintiff's former mistress, in a letter answering inquiries as to plaintiff's character, stated acts of misconduct during the time of plaintiff's being in her service, and also *subsequently* to her having left it, and defendant had also stated the same to the persons who originally recommended plaintiff to her; held, that the latter part of the letter was a privileged communication, and which the defendant was bound to make, and that the oral statement having been made only to the persons who recommended plaintiff, was not officious nor evidence of malice, which in such an action is the gist, and must be expressly proved.[2] In an action for slander of the plaintiff, in her character of a domestic servant, the plaintiff proved that, having lived some time with the defendant, she changed service upon a character given to her by the defendant; that, some time afterwards, the defendant's wife,

[1] Rogers *v.* Clifton, 3 B. & P. 587, on the motion for a nonsuit, Lord Alvanley, Ch. J., said, "If it were to be understood that whenever a master gives a bad character to a servant who has quitted his service, he may be forced by the servant, in justification, to prove the truth of what he has stated, it would be impossible for any master (so understanding the law, at least with any regard to his own safety) to give any character but the most favorable to a servant, *and consequently impossible for a servant not entitled to the most favorable character, to obtain any new place.* Unquestionably the master is not bound to substantiate the truth of what he says in giving a character to his late servant, but it is equally clear that the servant may, if he can prove the character to be false, and the question between the master and servant will always, in such a case, be, whether what the former has spoken concerning the latter be malicious and defamatory;" and per Rooke, J., "a master may, at any time, *whether asked or not*, speak of the character of his servant, provided that he speak in the honesty of his heart, and an action cannot be maintained against him for so doing; at the same time, masters are not warranted in speaking ill of their servants from heat and passion." Where the plaintiff charged his servant with robbing him, and the robbery charged consisted in giving away pieces of bread, the court charged the jury that if the pieces of bread given away were such pieces as the servant might reasonably suppose the master would not object to his giving away, the master was not justified in the charge of robbery, and the servant might recover. (Roberts *v.* Richards, 3 Fost. & Fin. 507.)

[2] Child *v.* Affleck, 9 B. & C. 403.

in a letter to her new mistress, alluded to the plaintiff, and to the character first given of her as being unmerited; that thereupon the new mistress requested further information, and was told by the defendant's wife that she had discovered, since the time of the giving of the first character, that the plaintiff was dishonest. Held, that there was no evidence to be submitted to the jury of malice in the defendant's wife, and that the communication was privileged. If a servant obtain a place upon the strength of a character given by his master, and the master afterwards discovers circumstances which induce him to believe that the character was undeserved, he is morally bound to inform the new master of those circumstances, and the communication made concerning them is a privileged communication.[1] The plaintiff had been in the employ of defendant and his partners; on plaintiff leaving their employ, defendant and his partners gave him a written recommendation, and plaintiff afterwards went into the employ of C. Subsequently, defendant saw C., and said he desired to set him right in regard to a young man (the plaintiff) in his employ, that he was a liar, and he had doubts of his honesty; held a conditionally privileged communication.[2] The letter of recommendation, if untrue, would have rendered him liable to any one injured thereby, and he was privileged to say what he did for his own protection. Plaintiff was in the service of the defendants (husband and wife) as governess for fourteen months. After she left she sought an engagement elsewhere, and on an inquiry being made to the defendant (the wife) concerning the plaintiff, the defendant answered in writing, "I parted with her (the plaintiff) on account of her incompetency, and not being lady-like nor good tempered," adding, "May I trouble you to tell her (the plaintiff) that

[1] Gardener *v.* Slade, 18 Law Jour. Rep. N. S. 334, Q. B.; 13 Q. B. 796.

[2] Fowles *v.* Bowen, 30 N. Y. 20.

this being the third time I have been referred to, I beg to decline any further applications." Evidence was given of plaintiff's competency, and of her being lady-like and good tempered. It was left to the jury to say whether the letter was written maliciously, and that stating what was untrue was evidence of malice. The plaintiff had a verdict, and the court above refused to disturb it.[1] Where the plaintiff's master (the defendant) had, on his quitting his service, and being about to enter on another, written of his own accord a letter informing the party that he had discharged the plaintiff for misconduct, and on receiving a letter inquiring the particulars, had written the libelous letters for which the action was brought; held, that although *a party might set himself in motion to induce inquiries by a third party*, and the answers, although slanderous, might come within the scope of a privileged communication, yet in such a case it would be a question for the jury to say if the defendant acted *bona fide*, or maliciously intending to do the servant an injury.[2] A. (plaintiff) having left B.'s (defendant's) service at her own desire, in consequence of B.'s accusing her of dishonesty, returned to B.'s house for her boxes, and B. then charged her with theft and told her that if she had not come back he would have said nothing about it; upon A.'s informing B. that C. intended coming to him for her (A.'s) character, defendant said he should give A. no character, unless she confessed to the alleged theft. C. went to defendant for A.'s character; defendant told C. that A. was dishonest. In an action for slander, held, that the occasion was privileged, but that the statement of defendant to plaintiff was evidence from which malice might be inferred, and that the judge upon the trial

[1] Fountain *v.* Boodle, 3 Ad. & El. N. S. 5; 2 Gale & Dav. 455. In Behee *v.* Pacific R. R. Co. 9 So. West. Rep. 450, the judge at the trial instructed the jury that malice in fact was necessary to enable plaintiff to recover, but failed to point out that malice in fact might be inferred from circumstances, and for this omission a new trial was granted.

[2] Pattison *v.* Jones, 8 B. & C. 578.

did right to leave the question of malice to the jury, and in asking them the question whether defendant believed his imputation to be true.[1] The plaintiff was defendant's gardener. The defendant having dismissed plaintiff from his service, wrote E., on whose recommendation defendant had originally engaged plaintiff,, stating *inter alia*, " On Saturday I had another scene with F. (plaintiff) in my garden. He was extremely violent, came towards me several times with an open clasp knife in his hand and his eyes starting from their sockets with rage, a perfect raving madman. I was fortunately accompanied by my upper servant. He accused me of having opened a letter of his. . . . I think it right you should be informed of F.'s (plaintiff's) violent conduct, as you might unwittingly recommend him without being aware of his temper and faults." E., who was the superintendent of the Royal Horticultural Society, of which defendant was a member, was in the habit of recommending gardeners to the members of the society, and plaintiff had, as defendant knew at the time he wrote the letter, applied to E. to procure him another situation; held, that the letter could not be considered as privileged, as there were expressions in it, such as plaintiff's being a "raving madman," which went beyond what was justifiable, although the jury found the communication was made *bona fide* and without malice.[2]

§ 247. As respects publications concerning candidates for *office*, we take upon ourselves, with due deference to the decisions, to say, that the same rules apply to them as to communications made concerning candidates for employment generally (§ 245), or as apply to those who in a measure challenge criticism by appearing as authors, actors,

[1] Jackson *v.* Hopperton, 10 Law Times, N. S. 529.

[2] Fryer *v.* Kinnersley, 15 C. B. N. S. 429; 33 Law Jour. 96, C. P. In Cowles *v.* Potts, 34 Law Jour. 248, Q. B. by counsel: it is difficult to understand the case of Fryer *v.* Kinnersley; and by Blackburn, J.: I do not quite understand the *ratio decidendi* of that case.

theatrical managers, or in fact, in any role, which appeals to the public and gives occasion for criticism (§ 254). The rule, as we suppose, must be the same for every *kind* of employment, and *office* is only another name for *employment*. The right which one has to speak concerning a candidate for employment as a mechanic or domestic, is neither more extensive nor more limited than the right one has to speak of a candidate for the office of a legislator or a judge.[1] As respects a candidate for employment generally, so with respect to a candidate for office; the publication to be privileged, must, with certain exceptions be confined to a criticism of his acts,[2] or be limited to the

[1] At a meeting of a body of citizens of Philadelphia, styled "The committee of one hundred," assembled for the purpose of considering the merits of candidates for public office, a letter reflecting severely upon the character of one of the judges of the Common Pleas, who was a candidate for re-election, by statements subsequently acknowledged to be wholly untrue, was, by order of the chairman, read by the Secretary, and appeared at length the following day in the daily papers. The communication being based upon probable cause was proper for discussion at such a meeting, and the court refused to reverse a judgment of nonsuit entered in an action for libel brought against the chairman of the meeting. (Briggs *v.* Garrett, 111 Penn. St. 404.)

Words spoken of a candidate for election in good faith, believing them to be true and without malice, and with the honest purpose of protecting the public from the supposed dishonesty of such candidate, do not render the person speaking them liable in an action for slander. (Mott *v.* Dawson, 46 Iowa, 533; and see State *v.* Beach, 2 Pac. Rep. [Kans.] 609; Neeb *v.* Hope, 111 Penn. St. 145.)

When one becomes a candidate for public office conferred by popular election, he puts his character in issue so far as respects his qualification for the office. Discussion, however, should be conducted *bona fide*. (Express Printing Co. *v.* Copeland [Tex.], 20 The Rep. 286.)

To charge a candidate for a popular office, with being uneducated, to be lazy and ignorant, is not libelous, nor is it libelous *per se* to charge him with being a "social leper," who should be "deodorized." But otherwise to charge him with being a professional gambler, bully, thief and whoremaster. (Sweeney *v.* Baker, 13 W. Va. 158.)

Charges against a public officer made more than a year before the next election, in alleged view of that election and upon the assumption that he would be a candidate, are not privileged. (Commonwealth *v.* Wardwell, 136 Mass. 164.)

[2] "There is no doubt the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct." (Lord

persons interested (§ 244). A general publication, as well to those interested as to those not interested, would not be privileged. Again, the matter published must be such as is relevant to the subject-matter, and necessary to be known by the persons in interest for their own protection. Thus, the publication in a newspaper of defamatory matter concerning a candidate for appointment, was held not to be privileged, and that to have been privileged the publication should have been limited to the appointing power (§ 243);[1] so limited it would have been privileged; as where defendant, at the request of a senator of the United States, in order to give him information as to the fitness of the plaintiff for the office to which he was nominated, spoke the words charged in the declaration, and referred to the records of a court for their confirmation, it was held that there was nothing from which to imply malice, and that the plaintiff could not sustain his action.[2] Where a

Herschell, L. J., Davis *v.* Sheptone, 11 App. Cas. 188.) Neither the public press nor individuals can discuss the conduct and character of officers and candidates for office, without incurring liability, civil or criminal, for defamatory utterances published, although such publications may be made without malice and upon probable cause. (Banner Pub. Co. *v.* State, 16 Lea [Tenn.], 176.) The qualified privilege of fair comment upon a matter of public interest fails to protect defendant: (1) If the matters commented upon had no real existence, even though the writer may have honestly believed them to have existed; or (2) if the writer in writing the libel complained of, is actuated by malice against a third person, though not against plaintiff. (Stewart *v.* McKinley, 11 Vict. L. R. L. 802.)

[1] Hunt *v.* Bennett, 19 N. Y. 173; affi'g 4 E. D. Smith, 647. Defendant, a citizen and tax payer of Detroit, when interviewed by a newspaper reporter as to the candidacy of plaintiff for the office of comptroller, said he wondered if the people of Detroit would have the same experience with plaintiff as England had with Cyprus, and on being asked what that experience was he stated in effect that said Island turned out to be a huge graveyard, the whole surface covered with corpses and bones to the depth of sixteen feet. These remarks were published in a newspaper and held actionable. (Wheaton *v.* Beecher, 49 Mich. 348; and see Bronson *v.* Bruce, 59 *Id.* 596.)

[2] Law *v.* Scott, 5 Har. & J. 438. A statute in Pennsylvania provides: No person shall be subject to prosecution by indictment for investigating official conduct of public officers, &c. Where a person consents to become a candidate for public office, conferred by a popular election, he must be considered as putting his character in issue so far as it may respect his qualification for the office. (Com'wealth *v.* Odell, 3 Pittsb. [Pa.] 449.) The qualification of a candidate is a fit subject of comment, but private character is not to be attacked. (Rearick *v.* Wilcox, 10 West. Jur. 681.)

candidate for the representation of a borough circulated an address to the electors, asking for their suffrages, and claiming to be a fit and proper person to represent them in Parliament, and an elector in that borough published *in a newspaper* two letters addressed to the candidate, the first in answer to the circular, and the second in consequence of the treatment he had received from the candidate on the day of nomination at the hustings, and both letters contained imputations on the private character of the candidate; on the trial of an action for libel, the judge charged the jury that the occasion did not justify the publication, and the plaintiff had a verdict. On a motion for a new trial, it was claimed that it was justifiable for an elector *bona fide* to communicate to the constituency any matter respecting a candidate which the elector believed to be true and material to the election. *The principle was conceded by the court to be correct, but was held inapplicable, because the communication had not been confined to the constituency of the plaintiff, but had been published in a newspaper.*[1] Where the plaintiff was a candidate at a general election for re-election as a State Governor, the defendant published defamatory matter of the plaintiff in "An address to the electors of the State of New York." In an action of libel for this publication it was contended on the part of the defendant that the plaintiff could not recover unless upon proof of "*express*

[1] Duncombe *v.* Daniell, 8 C. & P. 222; 1 W. W. & H. 101, Denman, C. J. However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to *all the world* of facts injurious to a person who happens to stand in the situation of a candidate. See *ante*, § 243, and p. 417, n. 1. A publication by an elector, circulated among the voters of the district, containing charges derogatory to a candidate for office, containing some untrue statements, if circulated in good faith, and giving supposed truthful information, is privileged. (State *v.* Balch, 31 Kansas, 465.) If the reading of a letter to an assemblage of voters was excusable on the ground of privilege, the privilege was not taken away by reason of the presence of reporters for newspapers, they also being voters and interested in the contents of the letter. (Briggs *v.* Garrett, 111 Penn. St. 404.)

malice." The court held that malice was to be implied from the falsity of the publication.[1] In an action of slander, laying special damage, it appeared that plaintiff, a trustee of a charity, asked C., by whom he was employed as bailiff, to obtain signatures to a protest against his (plaintiff's) removal from his office of trustee. C. asked defendant for his signature; defendant refused, and on being pressed for his reasons for refusing, said that he would not keep a big rogue like plaintiff in the trust, and he explained the reasons for this opinion, which were that plaintiff had left the parish under discreditable circumstances, and without settling with his creditors, including the defendant. He also added he was surprised C. employed such a man. In consequence of this statement C. dismissed plaintiff from his employ. The jury found that defendant had not acted with malice, held that the words were privileged, and verdict entered for defendant.[2] And where the plaintiff was a candidate for re-election as overseer; at a meeting to elect overseers, the defendant charged

[1] Lewis *v.* Few, 5 Johns. 1; *post*, § 389. In Harwood *v.* Astley (4 Bos. & Pul. 47; 1 N. R. 47), an action for slander of a candidate for election to Parliament, the plaintiff succeeded and had judgment, which the court, on writ of error, affirmed principally, if not solely, on the ground that the jury must have found the publication to be *malicious*, and therefore not privileged. Officers and candidates for offices may be canvassed, but not calumniated. (Seely *v.* Blair, Wright, 358, 683; see Brewer *v.* Weakley, 2 Overt. 99; Root *v.* King, 7 Cow. 613; affi'd 4 Wend. 113, note; 1 Starkie on Slander, 301.) In Mayrant *v.* Richardson (1 Nott & McC. 374), an action of slander against a candidate for office, it was held by Nott, J., that when a man becomes a candidate for public honors he makes profert of himself for public investigation. No one has the right to impute to him infamous crimes or misdemeanors, but talents and qualifications are mere matters of opinion, of which the electors are the only judges, and in that case it was held that imputing weakness of understanding to a candidate for Congress was not actionable. In Commonwealth *v.* Clapp (4 Mass. 163), Parsons, Ch. J., says: "When a man shall consent to be a candidate for a public office, conferred by the electors of the people, he must be considered as putting his character in issue, so far as may respect his fitness and qualifications for office." But see Curtis *v.* Mussey, 6 Gray, 261: Aldrich *v.* Press Print Co. 9 Minn. 133; see *ante*, p. 401, note 1. It is not even a mitigation of the wrong of publishing defamatory matter of a candidate for office that the sole object of the publication was to defeat the plaintiff. (Rearick *v.* Wilcox, 10 Western Jur. 681.)

[2] Cowles *v.* Potts, 34 Law Jour. Q. B. 247.

the plaintiff with having, while in office as overseer, misappropriated the parish funds—held that, unless this statement was a malicious abuse of the occasion, it was privileged.[1]

§ 248. Insanity is a complete defense to an action for slander or libel.[2] Fools and madmen are tacitly excepted

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[1] George *v.* Goddard, 2 Fost. & F. 689.

[2] Bryant *v.* Jackson, 6 Humph. 199; Yeates *v.* Reed, 4 Blackf. 463; Dickinson *v.* Barber, 9 Mass. 225. See McDougald *v.* Coward, 95 No. Car. 368. Perhaps delirium tremens is a defense, for it is a species of insanity, and, like insanity from other causes, affects the responsibility for crime. (Maconnehey *v.* The State, 5 Ohio St. 77; O'Brien *v.* The People, 48 Barb. 275.) A lunatic is liable for a trespass. (Weaver *v.* Ward, Hob. 134; Krom *v.* Schoonmaker, 3 Barb. 647; Bullock *v.* Babcock, 3 Wend. 391; Rae's Medical Juris. 110; Mason *v.* Keeling, 12 Mod. 332; 2 Monthly Law Reporter, N. S. 487.) In the chapter in the Roman Law, entitled "*Si quis Imperatori maledixerit*," is a passage which, being interpreted, reads: "If the evil speaking proceed from levity, it is to be despised; if from madness, it is to be pitied; if from a sense of wrong, it is to be forgiven." A lunatic is liable for a libel. Per Kelly, Ch. B., *obiter*, Mordaunt *v.* Mordaunt, 39 Law Jour. Prob. & Matri. 59. See Avery *v.* Wilson, 20 Fed. Rep. 856.

It is not a defense to an action of slander or libel, that the words were not spoken in earnest, but as a jest, and that the defendant did not expect to be believed. (Hatch *v.* Potter, 2 Gilman. 725; Holt on Libel, 290, 291; Long *v.* Eakle, 4 Md. 454; McKee *v.* Ingalls, 4 Scam. 30; Wood's Civil Law, 247; and see Pieter Tonneman *v.* Jan de Witt, Valentine's Corporation Manual for 1849, p. 402; Addison on Contracts, 261.) An action for a tort would not lie if the act was done in jest. (Digest, xlvii, 10, 8; Spence's Origin of Laws, &c., 151.) Among the Percy Anecdotes, Division "The Bar," is an anecdote of a suit for slander brought by Serjeant Maynard, entitled "Golden Pippins and Pig," and in which it is stated the serjeant had a verdict in his favor, but judgment was arrested in consequence of the words complained against "being the burden of an old story which had been applied to the serjeant in *jest*, and without any intention to slander." In Campbell's Lives of the Lord Chancellors (V, ch. civ, p. 31) this anecdote is related more circumstantially. That words spoken in jest held to be a defense. (Adkins *v.* Williams, 23 Ga. 222; see Donoghue *v.* Hayes, Hayes' Ir. Ex. R. 265; note to § 281, *post*) Defendant, the proprietor of a newspaper called Ally Sloper's Half Holiday, a so-called comic paper, published the following: "Umbrella Tricks.—*Irate Customer:* Look here! I bought this *compactum* umbrella at your shop yesterday. You guaranteed that it would remain small and tidy, and now look at it! I can't fold it up into double its original size. *Shopkeeper:* (blandly, as he unfolds the article) I am sure I am very sorry, and I cannot acccount for it, unless—— (horrified) Why! my dear sir, you've been using it!" Plaintiff was the patentee of the *compactum* umbrella, and brought suit for libel on the above publication, with an innuendo that defendant thereby intended: that plaintiff fraudulently and deceitfully, and in breach of contract, manufactured and sold the *compactum* umbrella as one that would shut up in a small compass, well knowing that it would not. Defendant claimed that the alleged libel was merely a *joke*. Baron Huddleston, who presided at the trial, told the jury he did not know whether the *joke* was concerning plaintiff or his

out of all laws.[1] And Coke said: A madman is only punished by his madness. A judgment in action for slander was perpetually enjoined, upon the ground that at the time of the speaking the words, and of the rendition of the judgment, the defendant was insane in reference to the subject of the slander.[2]

§ 249. Drunkenness is not a defense to an action for slander or libel,[3] nor is infancy,[4] but drunkenness may, perhaps, be a matter of mitigation.[5]

§ 250. It is a good defense to an action for libel, that after the publication the plaintiff agreed with the defendant to accept the publication of an apology in full for his cause of action, and that such apology had been published.[6]

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umbrellas; they might give plaintiff £100,000 or one farthing, or find a verdict for defendant. The verdict was for defendant. (36 Alb. L. J. 42; see *ante*, p. 241, note 10.)

[1] Holt, Ch. J., City of London *v.* Vanacker, Carthew, 483. "There is no slander in an allowed fool." (Twelfth Night, act 1, sc. v.)

[2] Horner *v.* Marshall, 5 Munf. 466.

[3] McKee *v.* Ingalls, 4 Scam. 30; Reed *v.* Harper, 25 Iowa, 87. As to defense of intoxication in an action on an express contract, see Gore *v.* Gibson, 13 M. & W. 623.

[4] Defries *v.* Davis, 1 Bing. N. C. 692; 1 Scott, 594. An infant two years old is not liable *criminaliter* for a nuisance erected on his lands. (The People *v.* Townsend, 3 Hill, 479.) And one aged only eleven years, seized of lands in the usual occupation of his guardian in socage, is not indictable for the non-repair of a bridge *ratione tenure*. (Rex *v.* Sutton, 5 Nev. & Man. 353; see cases collected in a note in 5 Monthly Law Reporter, N. S. 364, Boston. Nov. 1852.)

[5] Howell *v.* Howell, 10 Ired. 84; and see Iseley *v.* Lovejoy, 8 Blackf. 462; Gates *v.* Meredith, 7 Ind. 440.

[6] Boosey *v.* Wood, 3 Hurl. & Colt. 484. An agreement not to bring any action in consideration of the defendant's destroying certain documents relating to the charge imputed to the plaintiff, which the defendant accordingly destroyed, held to be accord and satisfaction. (Lane *v.* Applegate, 1 Starkie, 97.) Where, in an action of slander, an agreement had been made, in consequence of which the defendant signed a paper stating that "at his request the plaintiff had consented on his paying the costs of the action as between attorney and client, and making an apology for his conduct to stay the proceedings therein," the court held that it was an absolute and not a conditional agreement, and in default of defendant paying the costs, made a rule absolute for signing the judgment as for want of a plea. (Yardrew *v.* Brook, 2 Nev. & M. 835.) As to the settlement of an action for slander as the consideration for a promise, see O'Keson *v.* Barclay, 2 Penn. & W. (Pa.) 531; approved Morey *v.* Newfane Township, 8 Barb. 653; and see Shephard *v.* Watrous, 3 Caines R. 166. By statute 6 & 7 Vict. ch. 96, it is provided that in any action for defamation the defendant, after notice, may give in evidence, in mitigation, the making or offer to make an apology. (See note to § 252, *post*.)

And it seems that an agreement that the slanderer should write a letter to a third party, exculpating the person slandered from the charge, is satisfaction of the injury, and his so doing is evidence of an accord and satisfaction.[1] Formerly a defense of accord and satisfaction did not require to be specially pleaded.[2] Now it must be pleaded specially.[3]

§ 251. A former recovery for the *same* cause is a bar to an action for slander or libel.[4] A judgment in an action of slander, for a particular charge, bars any other action against the defendant in that action for the same charge, though made on a different occasion, if made before suit brought; and, therefore, though there be but one count for particular words, proof that they were spoken by defendant on distinct occasions before suit commenced is competent.[5] It is no bar to an action for slander or libel that in a former action for the publication of the same words, on an occasion different from that alleged in the declaration, the defendant obtained a verdict and judgment in his favor. It was not for *the same* cause of ac-

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[1] Smith *v.* Kerr, 1 Barb. 155; see Eiffe *v.* Jacob, 1 Jebb & Symes, 257. An accord and satisfaction by one or some of several wrong-doers, is a satisfaction as to all. (Strang *v.* Holmes, 7 Cow. 224; Knickerbacker *v.* Colver, 8 *Id.* 111.) It follows that a partial satisfaction by one of several wrong-doers is a satisfaction *pro tanto* as to all. (Merchants' Bank *v.* Curtiss, 37 Barb. 320.) As to a plea of apology and payment into court in England, see Stat. 6 & 7 Vict. ch. 96; 15 & 16 Vict. ch. 76; Chadwick *v.* Herapath, 3 C. B. 885; O'Brien *v.* Clement, 3 Dowl. & L. 676; Lafone *v.* Smith, 3 Hurl. & N. 735; 4 *Id.* 158; Ingram *v.* Ferguson, 1 New Pr. Cas. 486.

[2] 2 Greenl. Ev. 321; Lane *v.* Applegate, 1 Starkie, 97; King *v.* Waring, 5 Esp. 13; Eiffe *v.* Jacob, 1 Jebb. & S 257; Wadsworth *v.* Bentley, 23 Law Jour. 3 Q. B. Reparation by one publisher of a libel, and the discontinuance of the action against him, is no bar to an action against another publisher of the same libel. (McMillan *v.* Boucher, 12 Low. Can. Jour. 319.)

[3] A plea of accord held bad. (Davis *v.* Ockham, Styles, 245.)

[4] Campbell *v.* Butts, 3 N. Y. 173. The plaintiff having once recovered, cannot afterwards recover for any subsequent loss by the same words. (Bull, N. P. 7; Mayne on Damages, 421; Fetter *v.* Beal, 1 L'd Raym. 339; 1 Salk. 11; Gregory *v.* Williams, 1 C. & K. 568.) Where the cause of action is the same, a judgment between the same parties is binding on each, and it is immaterial that the form of action is different, if the cause of action be the same. (Hitchin *v.* Campbell, 2 W. Bl. R. 827; *ante*, § 119.)

[5] Root *v.* Lowndes, 6 Hill, 518.

tion.[1] A recovery by the husband for slanderous words spoken of himself and wife, is not a bar to another action by the wife for the same slanderous words, in which the husband is joined as a nominal party plaintiff.[2] A recovery in an action for calling plaintiff a thief, not in the way of his trade, held not to be a bar to a subsequent action for words imputing to plaintiff in the way of his trade that he was dishonest and a cheat.[3] A recovery in an action for malicious prosecution is a bar to a subsequent action for slander, for the accusation uttered for the purpose of having the arrest made, and on the occasion when it was made.[4] But where the defendant published the accusation before or after making his complaint to have the plaintiff arrested, an action for that publication is not barred by the recovery in the action for the malicious prosecution.[5] An application for a criminal information against a party for the publication of a libel, which application has been refused, is no bar to an action on the case for the same ground of complaint.[6] At one time the defense of a former recovery might be given in evidence under the general issue;[7] now, the defense of a former recovery must be pleaded.

[1] Hanson *v.* Veatch, 1 Blackf. 369.

[2] Bash *v.* Sommer, 20 Pa. St. 159; and see *ante*, note 1, p. 100. A recovery against one of several parties to a joint tort precludes the plaintiff from proceedings against any other party not included in such action. (Cro. Jac. 74; Yelv. 68.) And, this, although the judgment in the first action is unsatisfied. (Brinsmead *v.* Harrison, Law Rep. 6 C. P. 584; L. R. 7 C. P. 547.) But where the evidence and the damage in the two actions might be different, as where two persons on different occasions have published the same libel, separate actions may be supported against each. (2 B. & P. 69.) Where a verdict with nominal damages (40s.) has been obtained against the publisher of a libel, that was held not to be any justification in an action against the author of the libel, nor to furnish any reason for not giving substantial damages, and the plaintiff had a verdict for £450. (Frescoe *v.* May, 2 Fost & F. 123.) The pendency of other actions against other publishers of the same defamatory matter, not a mitigating circumstance. (Harrison *v.* Pearce, 1 Fost. & F. 567.)

[3] Wadsworth *v.* Bentley, 23 Law Jour. Q. B. 3; 17 Jur. 1077.

[4] Sheldon *v.* Carpenter, 4 N. Y. 579. And *semble*, a recovery in an action for slander will not bar an action for malicious prosecution. Jarnigan *v.* Fleming, 43 Miss. 710.

[5] Rockwell *v.* Brown, 36 N. Y. 207; and see Schoonover *v.* Rowe, 7 Blackf. 202.

[6] Wakeley *v.* Cooke, 16 Law Jour. Rep. Ex. 225; 9 Law Times, 513; 16 M. & W. 822.

[7] Campbell *v.* Butts, 3 N. Y. 173.

§ 252. Whatever else may be intended by the phrase "freedom of the press," or "liberty of the press," it means the freedom or liberty of those who conduct the press. This freedom or liberty, properly understood, means only that for which Milton put forth his eloquent plea: "unlicensed printing." "The liberty of the press consists in printing without any previous license, subject to the consequences of law. The licentiousness of the press is Pandora's box—the source of every evil."[1] "The liberty of the press is connected with natural liberty. The use and liberty of speech were antecedent to Magna Charta, and printing is only a more extensive and improved kind of speech."[2] "The liberty of the press, therefore, properly understood, is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity in the form of the press."[3] "The liberty of the press consists in the right to publish with impunity, truth with good motives and for justifiable ends, whether it respects governments, magistracy, or individuals."[4] In the sense of unlicensed, the press has been free since A. D. 1694,[5] and, except in respect to newspapers, no greater de-

[1] Attributed to Lord Mansfield, cited Root *v.* King, 7 Cow. 628, and commented on 1 Mence on Libel, 158.

[2] Essay on the Liberty of the Press, chiefly as it respects personal slander, by Bishop Hayter, p. 6.

[3] Holt on Libel, bk. 1, ch. 4.

[4] Hamilton, arg., The People *v.* Crosswell, 3 Johns. Cas. 360; and see The Federalist, No. 81—The Fourth Estate; Areopagitica, a speech for the liberty of unlicensed printing (Holt White's edition is the best); Story on the Constitution, §§ 1880 to 1889; 1 Tindal's continuation of Rapin's History of England, 350; Remarks on Pultney's bill to prohibit the circulation of unlicensed newspapers. "The liberty of the press, when rightly understood, consists in laying no *previous* restraints upon publications, not in freedom from censure for criminal matter when published." (4 Stephens' Com. 346.) "The law of England is a law of liberty, and consistently with this liberty, we have not what is called an *imprimatur*; there is no such preliminary license necessary: but if a man publish a paper he is exposed to the penal consequences, as he is in every other act if it be illegal." (Rex *v.* Cobbett, 29 How. St. Tr. 49.) By liberty of the press, I mean complete freedom to write and publish without censorship and without restriction, save such as was absolutely necessary for the preservation of society. (Fitzgerald, J., 11 Cox Cr. Cas. 49.)

[5] On the introduction of the printing press into England, at the expense of the government, the press was regarded as a State right, and subject to the coercion of the crown.

gree of liberty for the press has ever been claimed.[1] But as respects newspapers, it is argued that the exigencies of the business of a newspaper editor demand a larger amount of freedom; that circumstances do not permit editors the opportunity to verify the truth prior to publication, of all they feel called upon to publish, and that they should not be responsible for the truth of what they publish.[2] Some concessions have already been made to these arguments.[3]

(See Hills *v.* University of Oxford, 1 Vernon, 275; Baskett *v.* University of Cambridge, 2 Burr. 661.) It was regulated, therefore, by the king's proclamations, prohibitions, charters of privileges, and licenses, and then by the decrees of the Court of the Star Chamber, until the abolition of that court in 1641. The Long Parliament, in 1643, assumed the power of licensing, and this was continued by various statutes till 1694. The printing press was regarded as too dangerous a contrivance to be suffered to be free. Governor Dongan was instructed (A. D. 1688) not to allow any printing press in New York, although Massachusetts had at that time enjoyed a printing press for nearly thirty years. The judges were unanimously of opinion that by the common law of England, no man not authorized by the crown, had the right to publish political news. (London Gazette, May 5 and 17, A. D. 1680.) "It was from the press that originated what is in fact the main distinction of the ancient and modern world—public opinion." (Holt on Libel, 61.) Whittier calls a newspaper an "opinion mill," and speaks of an editor who

> Had left the Muses' haunts to turn
> The crank of an opinion mill.

The Constitution of the United States provides: Congress shall make no law abridging the freedom of speech or of the press. (Amendment of 1789, art. 1.) The Constitution of New York provides: Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press. (Constitution of 1846, art. 7, § 8.) This is repeated in the Bill of Rights of that State, and similar provisions are, we believe, to be found in the Constitution of every State of the Union. In Thompson *v.* The State (5 Tex. Law Rev 49), held that the Texas statute providing for the levy of an occupation tax on persons selling or offering for sale the Police Gazette, and other like publications, is a valid law.

[1] "The courts have found it embarrassing to preserve in just harmony and proportion, the protection due to character and the protection which ought to be afforded to the liberty of the press." (1 Kent Com. 636.) If constitutional provision on the subject of the press is needed at all, it is for its restraint instead of its protection. International Review, July–Aug. 1876, David Dudley Field, and see 39 Alb. L. J. 101, 161, 181, 201, 285.

[2] In Marks *v.* Conservative Newspaper Co. (Dec. 1887), Lord Coleridge in summing up, remarked that counsel for defendant said everything that could be said on behalf of his clients when he said that "newspapers have a difficult duty to perform."

[3] A very sensible view of the rights and duties of newspapers, is contained in an opinion of Judge Freedman, of New York Superior Court, in the case of Roediger *v.* The Staats Zeitung: after stating that the law recognizes no right to a reputation, better than one's actual character (§ 32 *ante*), he proceeds: "The freedom of the press is guaranteed by constitutional provisions, and while in the exercise of

At present the law takes no judicial cognizance of newspapers. This seems remarkable, inasmuch as the courts

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the police powers inherent in every State every other business may be regulated almost to the point of prohibition, no law can be passed to restrain or abridge the liberty of the press. The freedom of the public press is thus recognized as one of the corner stones of our republican institutions, and this fact has an important bearing in the determination of the case of a libel alleged to have been published by a journal of respectable standing. In this respect the footing of a newspaper in this country differs materially from that of one which exists only by permission from the crown, and subject to regulation by the law-making power. In this country it is considered not only the right, but the duty of a newspaper to discuss questions of public interest and to criticise the acts of those who may be temporarily intrusted with power. So it is considered not only the right but the duty of a newspaper to inform its readers of the current news of the day. Of course the right must be exercised fairly, and duly discharged, with a due regard for truth and propriety. But, as a matter of fact, no caution that human art can devise will totally exclude libels from a newspaper. They come in a hundred forms —in reports, in correspondence, in cuttings from other papers, even in advertisements—and if the law were to be enforced in its full severity, as it was in England at the time that the doctrine prevailed, the greater the truth the greater the libel, no journal in this country could live for a month and fulfill its mission. The case of a libel appearing in a newspaper in the discharge of its duty to the public may fall, therefore, within that class of cases in which the language published would be libelous, and subject to the presumption of falsehood and malice, but for the occasion upon which it was used. These cases hold that if the language complained of was used in the discharge of some public or private duty, whether legal or moral, or recognized by social custom or in the conduct of defendant's own affairs in matters where his interest was concerned in such a way that he was called upon to speak, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defense, depending on the absence of actual malice.

"But this privilege is qualified and conditional. No proprietor, publisher or editor of a newspaper can use it for purposes of revenge or to gratify personal spite, and if he attacks an individual unnecessarily or without good reason his case is no better than if he were dealing with a matter wholly unprivileged. But the question whether he has so abused this conditional privilege is to be determined by the jury upon the facts of each case. Thus it has been held in cases against public newspapers that an editor is privileged in commenting fully and freely upon all questions and matters of general public interest; that the public conduct of public men may be discussed with the greatest freedom, provided the language be kept within the limits of an honest intention to discharge a public duty; that when any one consents to be a candidate for a public office he must be considered as putting his character in issue, so far as respects his fitness and qualifications for the office, and that publications of the truth on this subject with the honest intent of informing the people are not libelous; that a newspaper may lawfully publish the fact that a person has been arrested, and upon what charge; and that comments in a newspaper upon the report of a trial which has terminated, fairly made, without malice, and founded on the facts, are privileged. You will, therefore, have to look at all the facts which bear upon the privilege claimed in this case, and if, upon the whole of them, you should be of the opinion that the facts published came to the hands of the defendant or his subordinates in

take judicial notice of mercantile agencies and their mode of transacting their business.[1] Independently of certain statutory provisions, the law recognizes no distinction in principle between a publication by the proprietor of a newspaper and a publication by any other individual.[2] A newspaper proprietor is not privileged as such in the dissemination of news, but is liable for what he publishes in the same manner as any other individual.[3] The publica-

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the regular course of business as items of the news of the day, which had already been published in the Brooklyn Eagle, and that from the reputation of the latter journal and the manner of the publication therein and all the circumstances appearing to surround such publication, the defendant and his subordinates had reason to believe and did believe the facts published to be true, and that the republication in the New York Staats Zeitung was induced solely by such belief, and that the facts thus republished in the form of an abstract and with express reference to the source from which they had been received were of such a character as to constitute, in your judgment, proper and legitimate items of news for publication in the New York Staats Zeitung as the most influential newspaper organ of the German population of this city, and that the said journal, the moment a question was raised as to the truth of the charge, made substantially a full and complete retraction of the whole charge, the defendant is entitled to a verdict, though he may have failed in the justification attempted upon the trial."

We also refer the reader to a charge of Judge Brewer, Edwards *v.* Kansas City Times, 32 Fed. Rep. 813.

[1] *Ante*, note 1, p. 417.

[2] Davison *v.* Duncan, 7 El. & Bl. 231; Campbell *v.* Spottiswoode, 8 Law Times Rep. N. S. 201; 3 Fost. & F. 421; Regensperger *v.* Kiefer, 6 Cent. Rep. 266.

[3] The right to criticise is general; it is not the peculiar privilege of the press. (Kane *v.* Mulvany, Ir. Rep. 2 C. L. 402.) A writer in a newspaper has no other or greater privilege than any other individual. (Campbell *v.* Spottiswoode, 8 Law Times, N. S. 201.) As to privilege, there is no difference between a publication by a newspaper and a private individual. (Davison *v.* Duncan, 7 El. & Bl. 231.) "Conductors of the public press have no rights but such as are common to all. (Sheckell *v.* Jackson, 10 Cush. 26; The State *v.* The Banner Pub. Co. 22 The Reporter, 445; but see *contra* Palmer *v.* City of Concord, 48 N. H. 217; Sweeney *v.* Baker, 13 W. Va. 158, and particularly Briggs *v.* Garrett, 111 Penn. St. 404; Barnes *v.* Cambell, 59 N. H. 128.) But in this country, every citizen has the right to call the attention of his fellow-citizens to the administration of public affairs or the misconduct of public servants, if his real motive in so doing is to bring about a reform of abuses, or to defeat the re-election or re-appointment of an incompetent officer." (Smith, J., Palmer *v.* City of Concord, 48 N. H. 216, and see Miner *v.* Post and Tribune Co. 49 Mich. 358; Renwick *v.* Wilcox, 6 West. Jur. 681.) On March 14, 1859, in the New York Senate, Mr. Ely introduced a bill to amend chapter 130 of the Laws of 1854, by providing that no publication in any newspaper, respecting any person holding office shall be deemed a libel, and providing that any assault upon the person of an editor who has made any such publication shall not be illegal or punishable, unless resulting in the death or maiming of the person assaulted.

tion of defamatory matter is not privileged because published in the form of an advertisement,[1] or as news, or because furnished by a correspondent, or as copied from other papers.[2] The proprietor or publisher is liable on proof of publication,[3] although published against his orders;[4] but where the editor is sued he can be held liable only upon proof that he personally aided or procured the publication of the article in question.[5] In the case of newspapers published by joint stock associations, an officer of the association (the treasurer), it has been held, is not personally liable for the matter published in the paper, unless it is shown that he exercised some personal supervision over the publishing of the paper.[6] This being the case, after referring to the statutory provisions affecting publications in newspapers, it will be unnecessary separately to consider what a newspaper proprietor may or may not publish with impunity; we can review his rights and duties under the general head of criticism.[7]

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[1] Robertson *v.* Bennett, 44 N. Y. Superior Ct. Rep. 66; Perrell *v.* New Orleans Times, 25 La. Ann. Rep. 170; Harrison *v.* Pirree, 1 Fost. & F. 567.

[2] Thompson *v.* Powing, 15 Nev. 195; Mallory *v.* Pioneer Press Co. 34 Minn. 521; and see Bathrick *v.* Post and Tribune Co. 50 Mich. 629.

[3] Reg. *v.* Holbrook, 4 Q. B. D. 42.

[4] Hall *v.* Dunn, 1 Ind, 344; Com. *v.* Willard, 9 W. N. C. 524 (Pa.), *ante*, note to § 123. In such cases it has been held the proprietor is not responsible for any malice of the author or publisher *de facto*, and so not subject to punative damages. Haines *v.* Schultz, 12 Cent. Rep. 806.

[5] Reg. *v.* Ramsey, 15 Cox C. C. 231.

[6] Vanaernam *v.* McCune, 39 Hun, 316; McCabe *v.* Jones, 10 Daly, 222; Simonsen *v.* Herold Co. 19 The Reporter, 383. A limited company having printed a newspaper containing a libel for another limited company who published the same. Held, that in the absence of evidence of knowledge of the contents of the newspaper, the directors of the former company and the signatories to the articles of association of the latter company were wrongfully convicted. (Reg. *v.* Judd, 37 Week. Rep. 143.)

[7] For much interesting matter relating to newspapers we refer to "Newspaper Libel," by Samuel Merrill. Among the statutory provisions relating to libels in newspapers were: 38 Geo. III, ch. 78, entitled, An act to prevent the publication of newspapers by persons not known, &c., among other provisions, requires that before any newspaper is started, the proprietor must file an affidavit by the printer, publisher, and proprietor, stating the place where the paper is to be printed, and its title. This act was amended 5 Wm. IV, ch. 2. 32 Geo. III, ch. 60, entitled, An act to remove doubts respecting functions of juries in cases of libel. This is the statute enabling juries to give a gene-

§ 253. To criticise, in its widest signification, means passing an opinion, commenting. In this sense every one

ral verdict in actions of libel. The 18th section provides for a recovery in actions of libel. 60 Geo. III, ch. 8, am'd, 1 Geo, IV, ch. 73, to prevent and punish blasphemous libels. 60 Geo. III, ch. 9, to restrain abuses arising from the publication of blasphemous libels. This act requires newspaper proprietors to give security to pay the damages and costs in actions for libels published in the papers owned by them. 6 & 7 Vict. ch. 96, an act to amend the law respecting defamatory words and libel. (Am'd, 8 & 9 Vict. ch. 75.) It provides, among other things, that in actions for libels in newspapers or periodicals, the defendant may plead that the libel was inserted without actual malice, and without gross negligence, and *before* the action, or at the earliest opportunity afterwards, he published an apology; and gives liberty, with the plea of apology, to pay money into court. This act, it has been held, does not apply to criminal prosecutions. (Reg. *v.* Duffy, 2 Cox Cr. Cas. 45; 9 Ir. L. R. 329.) As to this statute, see Chadwick *v.* Herapath, 3 C. B. 885; O'Brien *v.* Clement, 3 Dowl. & L. 676; Reg. *v.* Holbrook, 26 Week. Rep. 144. The Times newspaper having published in the letter of a correspondent, that plaintiff, a tailor, had been flogged for an assault on a provost marshal, was furnished with a contradiction which it delayed publishing until after an action for libel had been commenced, held that this delay justified large damages, and that no plea under 6 & 7 Vict. could be allowed. (Smith *v.* Harrison, 1 Fost. & F. 565.) Where a defendant pleads an apology and payment into court, if the jury find the apology not sufficient, the jury are to assess the damages irrespective of the amount paid into court, and may give a verdict for less than that amount. (Jones *v.* Mackie, Law Rep. 3 Ex. 1.) As to the statute of 60 Geo. III, see *Re* Chaplin, 2 Hurl. & Colt. 270; *Re* Clements, 12 Law Times, 380; 18 Law Jour. Ex 304; *Re* Gregory, 13 Law Times, 142; and see 32 & 33 Vict. ch. 24, which repeals 6 & 7 Wm. IV, ch. 76. A plea of payment into court and apology not allowed with a traverse of the defamatory sense imputed. (Barry *v.* M'Grath, Irish Rep. 3 C. L. 576.) As to plea of apology, see Rish Allah Bey *v.* Johnstone, 18 Law Times, N. S. 620; Cotton *v.* Beaty, 13 Up. Can. C. P. Rep. 243; see notes 1, p. 351, and 1, p. 442, *ante*.) Pleas of apology, payment into court and justification allowed. (Hawkesley *v.* Bradshaw, 5 Q. B. D. 302; and Laws of N. Y. 1852, ch. 165; *Id.* 1868, ch. 430; Sanford *v.* Bennett, 24 N. Y. 20.

The New York Penal Code provides: § 247. A prosecution for libel cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein, of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report. § 248. The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any other person concerned in the publication, or in the report of anything said or done at the time and place of the public and official proceeding, which was not a part thereof.

In the Spring of 1889, the newspaper press of New York, led by the New York Herald, made a fierce onslaught upon the existing law of libel, particularly as applied to newspapers. Senators Saxton and Blumenthal introduced bills amending the law, but the Legislature refused to adopt them.

The laws of Michigan, 1885, p. 354, § 3, provide, that in suits brought for the publication of libels in any newspaper, only such actual damages as may be proved can be recovered, if it appear that the publication was made in good faith and did not involve a criminal charge and was due to mistake, and that a retraction was published, etc. Held, that the act was unconstitutional, in that it deprives persons of all adequate remedy for

is continually criticising,[1] and every one is continually furnishing occasion for criticism. Criticism may mean praise or censure. The latter is the sense in which it is more frequently employed, and is the only sense in which it enters into our present inquiry. We use criticism as a synonym for "fault-finding." Sometimes the term criticism is limited so as to indicate only "fault-finding" in matters of literature and art, or in respect to persons engaged in offices of public trust. We do not attempt to define, with any degree of precision, what is the ordinary sense of the term criticism, because we believe it has no definite connotation, and because we do not recognize any distinct or independent right, such as seems generally supposed to be implied in or to exist under the designation of *criticism*. In our opinion, one cannot, by styling defamatory matter criticism and the defamer a critic, escape from those rules which determine what is and what is not defamatory matter for which an action may be maintained.

§ 254. Criticism may be divided into criticism of persons and criticism of things. What one does, one's actions are things, and as such have a separate existence distinct from the person. *Every action, every thing* one does, is naturally and necessarily the subject of comment. *Every action, every thing* one does confers a privilege upon every person to speak or write *concerning such action or thing*. As to such action or thing every one may, in good faith, speak or write whatever seems to him fit to be spoken or written (§ 204). Save good faith, there is no limit to

many injuries to reputation caused by the publication of charges involving moral turpitude, but not technically criminal, and for which injuries no retraction can atone. (Park *v.* Detroit Free Press Co. 40 N. W. 731.) Similar laws in Minnesota and Connecticut have been upheld. (Allen *v.* Pioneer Press Co. 39 Alb. L. J. 294; Moore *v.* Stevenson, 27 Conn. 14; Hotchkiss *v.* Porter, 30 *Id.* 414.) As to the proposed change of the law in New York see 39 Alb. L. J. 285.

[1] What distinguishes man from the other animals is, that he alone has the faculty of meddling with what does not concern him. (The Abbé Galiani.)

criticism concerning a man's actions or his creations. "God forbid (exclaimed Baron Alderson)[1] that you should not be allowed to comment on the *conduct* of all mankind, provided you do it justly and honorably." "Public men, and above all public writers, must not complain if they are sometimes rather roughly treated. Public writers, who expose themselves to criticism, must not complain that such criticism is sometimes hostile."[2] "No criticism of a person holding a public office is libelous unless malicious."[3] "No one can doubt the importance in a free government of the right to canvass the *acts* of public men, and the tendency of public measures—to censure boldly the conduct of rulers, and to scrutinize the policy and plans of government. This is the great security of a free government."[4] "An editor may comment freely on the *acts* of government, officers or individuals, and indulge in occasional mirth and wit, and it is only when the character of the publication is malicious, and its tendency to degrade and excite to revenge, that it is condemned by the law, and subjects the publisher to prosecution."[5] "Liberty of criticism must be allowed, or we should have neither purity of taste or of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel which has for its object not to injure the reputation of any individual, but to

[1] Gathercole *v.* Miall, 15 M. & W. 319.

[2] Campbell *v.* Spottiswoode, 3 Fost. & F. 421. Approved and followed, Merivale *v.* Carson, 20 Q. B. D. 275.

[3] Harle *v* Catherall, 14 Law Times, N. S. 701. So said of language concerning one who held the office of "way-warden." The public have a right to discuss in good faith the public conduct and qualifications of public men, and in such discussion they are not held to prove the exact truth of their statements, or the soundness of their inferences, provided they are not actuated by express malice, or there is a reasonable ground for the statements and inferences. (Crane *v.* Boston Advertiser Co. 13 The Reporter, 650.) A citizen in discussing the conduct of public servants, in their official capacity, is not liable in damages for speaking the truth, as he designs to be understood, if spoken of the officer in his official capacity, without malice. (Rowand *v.* DeCamp, 96 Penn. St. 493.)

[4] Story on the Constitution, § 1888.

[5] Tappan *v.* Wilson, 7 Ohio, 193.

correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality."[1] "Every man who publishes a book commits himself to the judgment of the public."[2] "It is of the last importance to literature, and through literature to good taste and good feeling, to morality, and to religion, that works published for general perusal should be such as are calculated to improve, and not to demoralize, the public mind; and therefore it is of vast importance that criticism, so long as it is fair, reasonable, and just, should be allowed the utmost latitude, and that the most unsparing censure of works which are fairly subject to it should not be held libelous.[3] A man who publishes a book challenges criticism; he rejoices in it if it tends to his praise, and if it be likely to lead to an increase in the circulation of his work, and therefore he must submit to it if it be adverse, so long as it is not prompted by malice, nor characterized by such reckless disregard of fairness as indicates malice towards the author."[4] An official act of a public functionary may be freely criticised. The occasion excuses everything but actual malice

[1] Ld. Ellenborough, Tabart *v.* Tipper, 1 Camp. 350; and see Cooper *v.* Stone, 24 Wend. 442, An application for an information was refused against one for publishing that Ward's pill and drop had done great mischief in twelve different cases, and that they were a compound of poison and antimony, &c. (Rex *v.* Roberts, 3 Bac. Abr. tit. Libel, 492.) In Hibbs *v.* Wilkinson (1 Fost. & F. 608), the action was for libel, first of the plaintiff generally, secondly as a clergyman. It appeared that defendant had published a pamphlet entitled "Truth Vindicated," and the alleged libels were contained in a review of that pamphlet published in a newspaper. Verdict for defendant; and by Erle, C. J.: Where the plaintiff and defendant have both had recourse to the press, and the libel has been published in the course of a discussion in which both parties have been before the public, and in which the plaintiff *first* had recourse to the press, and made the matter public, it is important to see if malice has been made out against the party sued, or if he has published only what be believed was required for the interests of truth.

[2] Carr *v.* Hood, 1 Camp. 358; see Reade *v.* Sweetzer, note, 6 Abb. Pr. R. N. S. 9, a lengthy report of the trial of an action for libel on plaintiff as the author of Griffith Gaunt.

[3] Fair and reasonable comments, without malice, however severe in terms, may be published concerning anything made by its owner a subject of public exhibition. (Gott *v.* Pulsifer, 122 Mass. 235.)

[4] Cockburn, C. J., Strauss *v.* Francis, 4 Fost. & F. 1114.

and evil purpose in the critic; it will not excuse an aspersive attack upon the character and motive of the officer. To excuse such attack the truth of the utterances must be shown.[1]

§ 255. But, *as respects the person*, except in the instances and to the extent heretofore pointed out, *there is no privilege of criticism.* Defamatory language concerning a person can never be justified merely on the ground that it was published as a criticism. Whenever defamatory matter concerning a person is justifiable—*i. e.*, not actionable—it is on some other ground than that the language was published as a criticism. "No man has a right to render the person or abilities [inseparable incidents to the person] of another ridiculous."[2] "I think no *personal* ridicule of the author is justifiable."[3] If an author "has made himself ridiculous by his writings, he may be ridiculed; if his works show him to be vicious, his reviewer may say so. *But the latter has no right to violate the truth in* either respect."[4] "If the jury can discover anything *personally* slanderous against the plaintiff [an author] unconnected with the works he has given to the public, in that case the plaintiff has a good cause of action."[5] With-

[1] Hamilton *v.* Eno, 81 N. Y. 116. It is not permitted to publish of a public officer that he is unfit for his office (Broadbent *v.* Small, 2 Vic. Law Rep. L. 121); or of having received a bribe (Hamilton *v.* Eno, 81 N. Y. 116; Hand *v.* Winton, 38 N. J. L. 122); or of gross incapacity and ignorance (Speering *v.* Andrae, 45 Wis. 281).

[2] Holt, Ch. J., Reg. *v.* Tuchin, 2 Ld. Raym. 1061.

[3] Best, Ch. J., Thompson *v.* Shackell, Mo. & Malk. 187.

[4] Cooper *v.* Stone, 24 Wend. 442. Does not this mean the reviewer can only justify ridiculing *an author*, or accusing *him* of being vicious, by a defense of truth.

[5] Ld. Ellenborough, Carr *v.* Hood, 1 Camp. 358. But in the same case his lordship is reported to have said: "If the defendant only ridiculed the plaintiff *as an author*, the action could not be maintained.

In the case of Stuart *v.* Lovell, 2 Stark. Cas. 93, the plaintiff being one of the proprietors of the Courier newspaper, brought his action for libel against the defendant, the editor of the Statesman newspaper. Lord Ellenborough, in charging the jury, observed: "In the first place, the plaintiff was described as the prostituted Courier, and his full-blown baseness and infamy were represented as holding him fast to his present connections, and preventing him from forming new ones. It was certainly competent in *one public writer to criticise another*, exerting his talents in all the

out pretending to elicit the true source of the confusion of thought so obvious in the major part of the dicta and decisions upon the subject of criticism, we venture to assert that the difficulty is occasioned by, (1) overlooking the distinction between language concerning the person and language concerning a thing; and (2) in treating certain persons—authors, artists, &c.—as if a rule applied to them and to their productions different from the rules which apply to the manufacturer and to the merchant. It seems not to have been kept in view that an author is but a producer, and the maker of a watch is *an author* equally with the maker of a book. There is nothing at this day in the vocations of the author, the actor, the painter, or the sculptor, which makes the rights and duties of those who follow them less or greater than the rights and duties of those engaged in any other employment. We *should* construe language concerning an author or an artist by the same rules as we construe language concerning a lawyer, or a physician, a merchant, or a mechanic. "There is no doubt that a man who is an author has a right to have his character protected the same as if he acted in any other capacity. However, notwithstanding that, whatever is fair and can be reasonably said of the works of authors, *or of themselves as connected with their works*, is not actionable, unless it appear that under the pretext of criticising *the works*, the defendant takes the opportunity of attacking the character of *the author*, and then it will be a libel."[1]

latitude of free communication belonging to a *public* writer; and so it appeared to Lord Kenyon, in Heriot *v.* Stuart (1 Esp. 437), that the *opinions and principles* of a public writer were open to ridicule, in the same way as those of any other author, but that the privilege did not extend to calumnious remarks on the *private character* of the individual. In that respect, the editor of a newspaper enjoyed the rights of protection in common with every other subject. Since, then, the defendant in this case had stigmatized the defendant as the venerable apostle of tyranny and oppression, and as a man whose full-blown baseness and infamy held him fast to his present connection, because they left him without the power of forming new ones; in all this he had undoubtedly overstepped the limits which had been drawn, and by which his conduct ought to have been regulated."

[1] Tenterden, C. J., Macleod *v.* Wakley, 3 C. & P. 311. If the critic go out of his way to attack the private character of the author, such an attack

"I will not stop to weigh the argument which would disfranchise him (the plaintiff) because he is an author."[1] The essential questions in every case of criticism are, (1) Does the matter upon its face concern a thing? (2) and if it does, was it composed and published in good faith? Whatever other questions may arise, they are but secondary, and are, as already noticed (§ 204) material only so far as they serve to furnish answers to the two essential questions here mentioned. Plaintiff and his wife were joint authors of a play, "The Whip Hand." Defendant was editor of a newspaper, "The Stage." The play was performed and defendant published of it, among other things, that it was a hash up of matters which had been used *ad nauseam*, a fatuous husband with a *naughty* wife. The claim was, under the new rules of English pleading, that the article implied the play was of an immoral tendency. It was conceded by both parties there was no *adulterous* wife in the play. The judge charged, (1) did the article

is a libel. (Ld. Abinger, Fraser *v.* Berkeley, 7 C. & P. 621.) It is important that a line should be drawn between fair discussion for the promotion of the truth and publications for the aspersion of personal character. (Erle, C. J., Hibbs *v.* Wilkinson, 1 Fost. & Fin. 610.) "A critic must confine himself to criticism and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely from the love of exercising his power of denunciation." Huddleston, B., Whistler *v.* Ruskin, London Times, Nov. 27, 1878, in that case defendant published of plaintiff: "The ill-educated conceit of the artist so nearly approached the aspect of willful imposture. I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face." Verdict for plaintiff, one farthing. (See Gott *v.* Pulsifer, 122 Mass. 255.)

[1] Cooper *v.* Stone, 24 Wend. 442. In all cases of criticism, "The question is one of good faith." (*Id*) "The only question is, whether there was any excess in the comments; that was matter entirely for the jury." (Cockburn, C. J., Kelly *v.* Tinling, Law Rep. 1 Q. B. 701.) If it be shown that the comment is unjust, is malevolent, and exceeding the bounds of fair opinion, it is actionable. (Dibdin *v.* Swan, 1 Esp. 28.) The alleged libel published in a newspaper charged plaintiff with being an accomplice in a certain crime, then recently committed, and that to avoid arrest he feigned insanity and took refuge in a lunatic asylum. Plea in substance that plaintiff was a public man, professed to be a public educator, had been in the habit of delivering speeches and lectures, and made under his own name various publications, and that defendants were the publishers of a public journal, and in the exercise of a just spirit of criticism published the alleged libel; held not to be a justification. (Smith *v.* Tribune Co. 4 Bissell, 477.)

imply the meaning as imputed by plaintiff; (2) if the article was a fair criticism and did not bear the meaning imputed, defendant was entitled to a verdict; (3) no malice was imputed to defendant. Malice, if it existed, would be because defendant had exceeded his right of criticism; (4) if article no more than fair criticism, defendant not liable; (5) plaintiff must satisfy jury article was not a fair criticism. Jury found for plaintiff, damages one shilling. The judge allowed plaintiff to recover costs. Defendant appealed. The appeal was dismissed. The reasoning in the opinions upon the appeal is involved and obscure, but the court correctly states that criticism is not "a privileged occasion" in the sense in which that term is usually employed, and while the court dwells very much upon "*fair*" and "*unfair*" questions collaterally, it is in substance unanimous in deciding that the test is, does the article refer to the work criticised only, or does it go farther and affect the person. In the case then before the court, the question was did the so-called criticism of the play in effect mean to allege that plaintiff was the author of an immoral play, in which case it would be a libel, as affecting the person, or did the so called criticism affect the play only? Had the defendant gone beyond the work to attack the worker?[1]

§ 256. It was held to be within the limits of criticism to publish of a newspaper: "It is the most vulgar, ignorant, and scurrilous journal ever published in Great Britain."[2] This affected only the character of the newspaper, and not (except remotely) the reputation of any person. So it is within the limits of criticism to publish of a painting, that it was a mere daub, with other strong

[1] Merivale *v.* Carson, 20 Q. B. D. 275.

[2] Heriot *v.* Stuart, 1 Esp. Cas. 437; but it was in that case held *actionable* to publish of a newspaper, that it was low in circulation. And see Latimer *v.* West. Morning News Asso. 25 L. T. N. S. 44.

terms of censure;[1] or of an architect, that he acts on absurd principles of art.[2] In both of the last two preceding cases, it was left to the jury, as a question of fact, whether the censure was unfair and intemperate, and intended to injure the persons of the plaintiffs.[3] It was held not to be within the limits of criticism to publish of the plaintiff, a floricultural exhibitor, "the name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he, and a few like him, used to secure prizes, seem to have been broken in upon by some judges, more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice; if he be not the same man, it is a pity that two such beggarly souls could not be crammed into the same carcass."[4] Nor is it within the limits of criticism to write of the publisher of a magazine, that he had inserted in his magazine a series of articles, the greater part of which were false and of a gross character;[5] nor to write of a book publisher, that he published books of an immoral character, and ascribing to him the authorship of some silly rhymes.[6] Where the plaintiff, a surgeon, had presented a petition to Parliament against empirics and irregular practitioners, and defendant, in a medical journal, had commented on the petition, reflecting on the plaintiff for ignorance generally, and particu-

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[1] Thompson *v.* Shackell, Mo. & Malk. 187.

[2] Soane *v.* Knight, Mo. & Malk. 74.

[3] The question of the fairness of the comment is always for the jury. (De Mestre *v.* Syme, 9 Vict. L. R. L. 10, § 288, *post.*)

[4] Green *v.* Chapman, 4 Bing. N. C. 92; 5 Sc. 340. Not privileged to call plaintiff a degraded wretch. (Crotty *v.* McMahon, 1 Jones [Ir. Rep.], 465.)

[5] Colburn *v.* Whiting, cited Cooke on Defam. 58; and see Cooper *v.* Stone, 24 Wend. 434. Where it is said not to be within the limits of criticism to impute to an author falsehood and unworthy motives in the production of a book.

[6] Tabart *v.* Tipper, 1 Camp. 350; the rhymes were:

> There was a little maid,
> And she was afraid
> Her sweetheart would come to her,
> She bound up her head,
> When she went to bed,
> And she fastened her door with a skewer.

And were followed by this line:

> Dixin' ego vobis Atticam quandam inesse elegantiam.

larly in chemical knowledge; and the judge had directed the jury, that if they considered the libel a fair comment on the petition, and not a malicious effusion against the plaintiff, and also if they considered that it imputed to him ignorance in chemistry only, and not in his profession as a surgeon, to find for the defendant, which they did; the court granted a new trial.[1] Where the plaintiff, a "marine store dealer," had exhibited a placard in front of his store, offering certain prices for kitchen stuff, candle ends, pewter, plated goods, &c., and proposing to fetch them from private houses. Some observations upon this placard had been made by a magistrate officially, upon which the defendant published in a newspaper an article headed, "Encouraging servants to rob their masters," and imputing that the placard was calculated or intended to encourage servants to rob their masters. The placard was held to be a proper subject of criticism, and as the article did not go beyond the placard, or attack the plaintiff in anything not fairly arising out of that document, it was held privileged.[2]

[1] Dunne *v.* Anderson, 3 Bing. 88. The reporter, erroneously as we think, puts this decision on the ground that presenting a petition to Parliament is an act not obnoxious to criticism. The error for which the new trial was granted was the direction to find for the defendant, if the imputation was of ignorance in chemistry only.

[2] Paris *v.* Levy, 9 C. B. N. S. 342 [in banc]; 2 Fos. & Fin. 71 [Nisi Prius]. It was held not to be a libel upon a dealer in coal in L., who had advertised genuine Franklin coal for sale, to publish the following advertisement: "Caution.—The subscribers, the only shippers of the true and original Franklin coal, notice that other coal dealers in L. than our agent, J. S., advertise Franklin coal. We take this method of cautioning the public against buying of other parties than J. S., if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L., except our agent, J. S." (Boynton *v.* Remington, 3 Allen [Mass.], 397.)

In a previous note (No. 3, p. 329) we directed attention to the views of Lord Chief Justice Cockburn on criticism; we recur to the subject to give some extracts from his charge in the case of Seymour *v.* Butterworth, reported at length in the Law Magazine and Law Review (London), February, 1863, and given in an abridged form in The Monthly Law Reporter (Boston), May, 1863; also reported 3 Fost. & Fin. 384. The plaintiff, a barrister, Recorder of Newcastle-upon-Tyne, and member of Parliament, sued for an alleged libel upon him, published in the Law Magazine. We find in the charge: (1.) A man's public political conduct is matter for the freest and fullest discussion on the part of a writer in a public journal. (2) To animadvert on those who lend themselves to a system of buying and selling votes in Parliament, "is within the legitimate province of a *public*

Plaintiff, a naval architect, in 1867, submitted to the admiralty proposals for conversion of the old wooden line

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writer," but if he goes beyond that, and asserts that one "has bargained to sell his vote," it is a charge which no man, whether writing in public or in private, ought to dare to make. (3.) All men who occupy public positions must submit, now and then, to be a little roughly handled, and to be uncourteously and even unjustly treated, and people must not be too thin-skinned in reference to such matters. It has happened to everybody who has had anything to do with public life, to have, at one time or other, observations made upon his conduct and motives, which, in all probability, at the bottom of his heart, he has felt to be unfounded and unjust; but we submit to it, and why? because we know that, upon the whole, that bringing, by means of the public press, the conduct and motives of public men to the bar of public opinion, is the best security for the discharge of public duty. (4.) It is claimed that, although the conduct of a public man is open to public discussion, his *private conduct* is not, and that it does not lie in the mouth of a man, who has attacked another with reference to his *private conduct*, to say, I did it only in the fair discharge of a public duty. But there is this distinction in this case, that, however true that proposition may be with reference to the *private conduct* of a *private individual*, the plaintiff does not occupy the position of a *private individual*. . . . It is impossible to say the plaintiff was not a *public man*, and that his conduct, if it had reference to his fitness to be a *public man*, and to occupy a public position, was not a matter fit for discussion. (5.) I must dissent from the proposition that where a man holds a public position in which integrity, honesty and honor are essential and indispensable qualifications, if in his private conduct he shows he is destitute and devoid of those essential elements, that it is not a fair subject for public animadversion and hostile criticism, *so long as the writer confines himself within the bounds of truth and within the limits of fair and just observation.* Elsewhere in the charge his Lordship speaks of the rights and duties of a public writer, and generally speaks as if a public writer was a person with peculiar rights and duties, whereas the law recognizes no such office as that of a public writer, and gives him no privileges except as mentioned *ante*, note 1, p. 351. We do not consider sound the distinction between public men and private men, and public acts and private acts To say, as is said in the fifth of the foregoing extracts, that one may criticise "*so long as the writer confines himself within the bounds of truth and within the limits of fair and just observation.*" is merely saying one may publish the truth, and criticise where it is fair and *just* to do so. To limit criticism to just criticism is, in effect, to toll the right of criticism, as it substitutes the judgment of the jury for the judgment of the critic. In another case, Strauss *v.* Francis (4 Fost. & Fin. 939), also tried before Lord Cockburn, the plaintiff was the author of a novel called "The Old Ledger," and the defendant the editor of the Athenæum. The defendant published a criticism of this novel, for which the plaintiff brought an action for libel, and on the trial, with the consent of the defendant, withdrew a juror. The defendant then published an article under the heading "The Rights of Criticism," in which he republished the original criticism, with comments on the trial, at which the plaintiff withdrew a juror, and stating that he (defendant) consented to the withdrawal of a juror because he believed had he recovered a verdict he could not collect his costs of the plaintiff. In an action for this second publication (4 Fost. & Fin. 1108), the judge charged the jury "that the action related to two separate matters of complaint, which should be kept distinct—first, the review on the work; next,

of battle ships of the navy into iron-clad turret ships. His proposals were rejected. In 1870, the iron-clad turret ship

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the comments on the trial. The republication of the criticism on the work brought it under the notice of the jury, and it would be for them to say whether the criticism was fair and reasonable, or whether the writer of it was actuated by malice. That it was severe there could be no doubt, but the question was, was the severity warranted by the nature of the book? It was conceded that it was of vast importance to literature, and, through literature, to the morals, religion, good taste and good feelings of the public, that works which were laid before them for their perusal should be of such a character that they would improve and not demoralize. It was, therefore, right and wholesome that criticism, so long as it was fair and just, should be allowed the largest latitude. Authors courted criticism, because, if it were favorable, it would secure popularity for, and extend the circulation of, their works; but, as they challenged criticism, they should submit to it when it was adverse, so long as it was not prompted by recklessness or malice. It had been contended on behalf of the plaintiff that it was unfair to select isolated passages from a work and fasten on them, disparaging the spirit and character and object of the entire book; but that observation was open to this remark, that it was not because a work might, as a whole, be good, that a critic, if he found many passages of an obnoxious character, must abstain from commenting on them. That some of the passages read warranted the charge of indelicacy, some the charge of profanity, and many of them the charge of gross vulgarity, was, he thought, a matter as to which they could not fail to give an answer in the affirmative. The fair critic was a prosecutor who brought to the bar of public opinion offenders against good taste, against delicacy and propriety. The work in question was denounced as being abominable. That was, no doubt, a strong expression. It was for the jury, having the book before them, and having heard what had been said for and against it, to say whether the criticism in question was a fair representation of the character of the work. The jury found for the defendant. [See note to § 258, *post*.] In another case, Campbell *v.* Spottiswoode (3 Fost. & F. 421, we quote from the London Quarterly Review of April, 1865, art. Libel), the plaintiff, the editor of the British Standard, had published in that newspaper a series of appeals on behalf of missions to China. The alleged libel was an article published in the Saturday Review, commenting on those appeals, and in which the plaintiff was called an "imposter," and charged "with scandalous and flagitious conduct." On a trial before Lord Cockburn, the plaintiff had a verdict, the judge charging the jury that the defendant had exceeded the limits of criticism, and added: "It cannot be said that, because a man is a public man, a writer is entitled not only to pass judgment upon his conduct, but to ascribe to him corrupt and dishonest motives." A motion for a new trial was denied; Lord Cockburn, in giving judgment (8 Law Times Rep. N. S. 201; 3 B. & S. 769; 3 Fost. & Fin. 421, note), said: "But it seems to me that a line must be drawn between hostile criticism upon a man's public conduct and the motives by which that conduct may be supposed to be influenced, and that you have no right to impute to a man in his conduct as a citizen—even though it be open to ridicule or disapprobation—base, sordid, dishonest or wicked motives, unless *there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly maintained some mistaken belief upon the subject, but that your belief is well-founded, and not without cause.*" We do not understand the part in *italics*. In our opinion, his Lordship should have said that you must not impute dishonest or wicked motives

"Captain" capsized and sunk with all hands. This disaster caused great public excitement. To explain the matter, the defendant prepared a minute for presentation to Parliament. This minute criticised the plans of plaintiff. In a note to the board by the then controller of the navy, he said: "These plans would have no weight from the known antecedents of their author, but they derived weight from the approval of Mr. Watts," and recommended the rejection of said plans. The minute, including the above note, was, by order of the admiralty, printed by the defendant, and publicly sold, *before the meeting of the Parliament* to which the minute was addressed. On the trial, it being conceded there was no malice, the judge nonsuited plaintiff, on the ground that the publication was privileged as a fair criticism on a matter of public importance. Held, by a divided court (two judges against one) that the nonsuit

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unless you can establish the truth of the imputation. He came very near to our views in Turnbull *v.* Bird (2 Fost. & F. 508)—we still quote from the London Quarterly—in which he charged the jury: "If you are of opinion that the defendant, in the comments that he made, was guilty of any *willful* misstatement of fact, either by the exaggeration of what actually existed, or by the partial suppression of what actually existed, so as to give it another color, or if he makes his comments with any misstatement of fact, *which he must have known to be a misstatement by the exercise of ordinary care,* then he loses his privilege, and the occasion does not justify the publication." We should indorse this if the words in *italics* were omitted. (See, however, Cooper *v.* Lawson, 8 Adol. & El. 746.)

Publication, by reform commissioners, of a report imputing bribery to plaintiff, giving his name as one who had been sued for bribery, was held not privileged. (Wilson *v.* Reed, 2 Fost. & F. 149.) The plaintiff was the publisher of Zadkiel's Almanac, an astrological publication; the defendant charged that the plaintiff, being the publisher of that silly work, had *gulled* the public by means of a magic ball of crystal in which future events could be seen; held that this could be justified only by proving that plaintiff, knowing it to be an imposture, took money from the public for the use of said ball. (Morrison *v.* Belcher, 3 Fost. & Fin. 614; see Eastwood *v.* Holmes, 1 Fost. & Fin. 347.) A publication of a report of an inspector of charities under the charitable trust act, containing a letter written several years previously, reflecting on plaintiff, held conditionally privileged. (Cox *v.* Feeney, 4 Fost. & Fin. 13.) The prosecutor, not in any way connected with the theatre, got up an entertainment he called "A Dramatic Ball," which turned out a disorderly affair. A newspaper, the organ of the theatrical profession, commented severely upon the affair, and upon the prosecutor for getting up such a ball for his own benefit and styling it "A Dramatic Ball" The publisher was found not guilty. (Reg. *v.* Ledger, London Times, January 14, 1880.)

was right, and by the dissenting judge it was not so clearly privileged as to warrant the taking the case from the jury.[1]

§ 256 *a*. The conduct of a party to a suit, in giving his testimony as a witness in a court of justice, is a fair subject of comment. So of the conduct of a witness who is not a party.[2] The administration of justice is a matter of public interest, and therefore a proper subject of public comment.[3] Where the libel was a comment upon a proceeding before a magistrate, the court charged that, if the publication meant that the magistrate had acted hastily in dismissing the case, and that it would have been more satisfactory if all the evidence had been heard, that would be legitimate comment; but if, under the pretense of commenting upon the magistrate, the publication was intended to charge the plaintiff with being guilty of the offense for which he had been arraigned, it was not privileged.[4]

§ 257. As the right of criticism is confined to criticising actions or things, it necessarily follows that, as a preliminary to all right of criticism, it must appear that the action or thing criticised had an existence; therefore, a justification on the ground of criticism can never prevail, unless the existence of the action or thing, which the criticism is alleged to concern, is either admitted or proved. An alleged criticism consists in the statement or assumption of certain *facts*, and of comments thereon.

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[1] Henwood *v.* Harrison, Law Rep. 7 C. P. 606; dissented from, Merrivale *v.* Carson, 20 Q. B. D. 275.

[2] It is not fair comment to say the testimony was "maliciously or recklessly false" (Hedley *v.* Barlow, 4 Fost. & F. 224); nor to say the witness committed perjury. (Roberts *v.* Brown, 10 Bing. 519; 4 M. & S. 407; Carr *v.* Jones, 7 East, 493; Felkin *v.* Herbert, 10 Jur. N. S. 62; Littler *v.* Thompson, 2 Beav. 129.)

[3] Kane *v.* Mulvany, Ir. Rep. 2 C. L. 402; and see Hedley *v.* Barlow, 4 Fost. & Fin. 227.

[4] Hibbins *v.* Lee, 4 Fost. & Fin. 245. It is not fair comment to suggest that the prisoner, although acquitted, was really guilty. (Rish Allah Bey *v.* Whitehurst, 18 L. T. N. S. 615.) Nor is it fair comment to compare the attorneys in the cause with Quirk, Gammon & Snap. (Woodgate *v.* Ridout, 4 Fost. & Fin. 202.)

Where these facts are not admitted, to constitute a justification their existence must be shown.[1] Hence, to justify a criticism, it is sometimes necessary to allege that the facts which warrant *a* criticism exist, and that the comment on those facts is fair.[2] Where the defamatory matter was that plaintiff, a tradesman in London, became surety for the petitioners in the Berwick election petition, and falsely stated on oath a sufficient property qualification, when, in truth, he was not able to pay his debts. It then asked why the plaintiff, being unconnected with Berwick, should take so much trouble and incur such an exposure of embarrassments, and proceeded: "There can be but one answer to these queries—he is hired for the occasion." The defendant justified as true all the publication, except the charge of being hired, as to which no mention was made, and, as a further defense, that the publication was a correct report of judicial proceedings, with a fair and *bona fide* commentary thereon. Held, it was properly left to the jury to say whether the imputation that the plaintiff was hired was a fair comment.[3]

§ 258. As criticism is *opinion*, it can never be *primarily* material to inquire into its justness. The right to criticise implies the right to judge for one's self of the *justness of the criticism.* It would seem to be but a delusion to say one has the right to criticise, *provided* the criticism be just. The justness or unjustness can never be

[1] Stewart *v.* McKinley, 11 Vict. Law Rep. L. 802; Browne *v.* McKinley, 12 *Id.* 240.

[2] Fry *v.* Bennett, 1 Code Rep. N. S. 239; 5 Sandf. 54; Buddington *v.* Davis, 6 How. Pr. R. 401. "The occasion of the publication of libelous matter is never irrelevant, and is for the jury, and the jury have to consider, taking into view the occasion on which matter is written which might injure another, is it a fair and proper comment, or is it not more injurious than the circumstances warranted? But, on the other hand, it has never been held that the occasion being lawful can justify any libel however gross." (Reg. *v.* Hicklin, Law Rep. 3 Q. B. 376, Blackburn, J.)

[3] Cooper *v.* Lawson, 8 Adol. & El. 746. The question whether on the facts proved the publication was a fair comment, is for the jury, although gross dishonesty is plainly imputed. (De Mestre *v.* Syme, 9 Vict. Law Rep. L. 10.)

more than matter of opinion. The test always is, Was the criticism *bona fide?*[1] It is like the case of one writing concerning the sanity of another; the test of the justification is not, Was the statement such as a man of sound sense would have made? but Was it the honest conviction of the publisher? (§ 206.) Although that was a case of comment or giving an opinion or criticism, was in fact, a criticism *concerning the person*, and found its justification not in its being a criticism, but because the publication was made to protect the interest of another. When it is argued that the right to criticise rests upon the interest which the community generally may have in the subject of the criticism, it is a confusion of two different and distinct rights. The community are no more interested in the person or reputation of any one individual than in the person or reputation of any other member of

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[1] Where the action is in respect of a comment on a matter of public interest, the case is not one of privilege, properly so called, and it is not necessary to a cause of action that actual malice on the part of defendant be proved. The question whether the comment is or is not actionable depends upon whether, in the opinion of the jury, it goes beyond the limits of fair criticism. (Merivale *v.* Carson, 20 Q. B. D. 275.) Henwood *v.* Harrison, L. R. 7 C. P. 606, dissented from, and Campbell *v.* Spottiswoode, 3 B. & S. 769, followed; see note to § 256, *ante.*

One Stewart opened a "School of Clerks, Salesmen and Reporters," and prominently advertised such school. A newspaper sent a reporter to interview Stewart, and published a somewhat jocose report of the interview. In an action by Stewart for such publication, held, that as the plaintiff held himself out as a teacher and guide of youth, and was seeking to attract youth to his place by signs and advertisements, he assumed a *quasi* public character, and whether he was a proper person to instruct the young, and whether his school was a proper place for the young to attend, were matters of importance to the public, and the defendant was in the strict line of its duty when it sought such information and gave it to the public, and if that information tended to show plaintiff was a charlatan, and his system an imposture, the more need the public should be informed of it (Press Co. *v.* Stewart, 119 Penn. St. 584; 12 Cent. Rep. 275; rev'g, S. C. 1 Pa. C. C. Rep. 247.)

Plaintiff, manager of the Queen's printing office in Ireland, and also employed on the staff of the Freeman's Journal in Dublin. The alleged libel appeared in the Saunders, another Dublin newspaper, and in substance charged plaintiff with having corruptly supplied to the Freeman's Journal information acquired by him as manager of said printing office. Plea, fair comment, alleged that before the publication complained of, plaintiff had written articles, published in the Freeman's Journal, commenting on these reports, before they had been given to the press, and in one case before the report was in the

society. Nor is there any foundation for the distinction sometimes attempted to be drawn between the *public* and the *private* character or standing of an individual; and although there are isolated *dicta* that appear to favor the idea that a person occupying a public situation is thereby rendered, personally, a subject of criticism, yet, as we conceive, the context of these *dicta* so far explains them as to limit the right of criticism to the *actions*.[1] Thus it has been said: "Every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury—we are all of us the subjects for public discussion; and provided a man, whether in a newspaper or not, publishes a comment on a matter of public interest, fair in tone and temperate, although he may express opinions that you may not agree with, that is not a subject for an action for libel; because whoever fills a public position renders himself open to public discussion; and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position.[2] In this country everything, either by speech or writing, may be discussed for the benefit of the public. No doubt, therefore, the defendant was at liberty to discuss the opinions or proceedings of the plaintiff. If he has done it fairly, temperately and calmly, then he is not a fit subject

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hands of members of House of Commons, and immediately before the article on one of the reports appeared in the Freeman's Journal, plaintiff had stated to an applicant from another newspaper for a copy of the report, that it would not be ready for some time, etc., and further, that defendant believed that the information for the articles in the Freeman's Journal on the reports could only have been procured from the Queen's printing office. On demurrer plea held bad. (Lefroy *v.* Burnside, 4 L. R. I. 556.)

[1] The public *acts* of a public man are public property on which every man is entitled to make *fair* comments, but to bring the case within the privilege, the comments must be on acts, not supposed acts. (Williams *v.* Spowers, 8 Vict. Law Rep. L. 82.)

[2] Criticism of the ability and methods of a teacher, by a superintendent of schools, was held not libelous. (O'Connor *v.* Sill, 60 Mich. 175.) Imputing to an actor general carelessness as to his dress and delivery, held privileged as criticism. (Ireland *v.* King, 5 Aust. Jur. Rep. 24.) Hissing an actor. (10 Cent. Law Jour. 57.)

for an action for libel."[1] "Every individual has a right to comment on *those acts* of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander. There is, indeed, a material distinction between publications relating to public and to private *persons*, as regards the question whether they be libelous. That criticism may reasonably be applied to a public man in a public capacity, which might not be applied to a private individual."[2] The first

[1] Bramwell, B., Kelly *v.* Sherlock, Law Rep. 1 Q. B. 689. Plaintiff, with two friends, attended a public meeting held for the purpose of hearing a candidate for election to Parliament, and of discussing political questions connected with said election. Plaintiff and his friends attended merely as listeners; but during the meeting expressed dissent to something that was said, which led to a disturbance, and plaintiff and his friends leaving the meeting under protection of the police. Defendant, in a newspaper, commented in disparaging terms upon the conduct of plaintiff and his friends, and used language capable of meaning that two of the party were intoxicated, and that they were arrested for misconduct. In a suit for this publication, the judge, on the trial, directed the jury that the comments were privileged if made in a fair spirit, and it was for the jury to say if the language imputed intoxication. The jury found for defendants; and, on refusing motion for a new trial, the court held the direction proper. (Davies *v.* Duncan, 43 Law Jour. C. P. 185.)

[2] Parmiter *v.* Coupland, 6 M. & W. 108. See Commonwealth *v.* Singerly, 38 Leg. Intel. (Pa.) 177; Commonwealth *v.* Beamish, 2 Law Times (Pa.), 138; Commonwealth *v.* Winchell, 3 Law Times, N. S. (Pa.) 111. The license to criticism allowed in England is exhibited in the case of Odger *v.* Mortimer (28 Law Times, N. S. 472): The plaintiff, a well-known public character, in addressing the meetings held to protest against a bill recently introduced into Parliament, had burned the bill, and predicted much popular irritation in event of its being passed. Thereupon the defendant published of him (amongst other things), in the Figaro newspaper, "Odger victorious. Know all men by these presents, that Odger, the cobbler, rules the government of England. . . . We do not like the cobbler, we abhor his principles, we regard him as an enemy of order, we hold him to be a demagogue of the lowest type, half booby and half humbug, a political Cheap Jack, who would be a political sharper if he had brains enough. . . . He defied Parliament and the government. . . . He threatened an unprecedented demonstration and civil discord. Odger is victorious. The government have modified their bill. . . . What may be Odger's next fancy it is impossible to guess. Perhaps he may assert the right of the Odgerites to refresh themselves in West-end pantries and wine cellars, or he may demand the release of all convicts who are so nearly connected with that section of the people which Odger, the cobbler, commands." Defendant also published the following: "I have any quantity of bottled-up abuse, treason and riot. I will exchange the whole lot for any permanent appointment with £250 per annum and upwards. George Odger." In an action for this publication, defendant pleaded not guilty, truth, and that the publications were "fair and *bona fide* comments upon the acts and proceedings of the government, and the several matters and premises therein referred to, and

sentence in this last quotation refers to acts, and is correct; and although the remarks in the subsequent sentences profess to apply to *persons*, yet they can be regarded as stating the law correctly only by limiting them to the *acts* of public men. Apart from the obsolete statutes of *scandalum magnatum* there is no distinction of persons, nor any division of persons into public and private (§ 181).[1]

§ 259. The *supposed* distinction between matters of fact and matters of opinion, is sometimes referred to as marking the difference between justifiable or unjustifiable comment or criticism. Criticism, it is said, is matter of opinion; and that while all expression of opinion is justifiable, a statement of fact is not justifiable, unless on the ground of truth.[2] This view is unsound. In one sense it is merely the expression of opinion to say of a minister, he entered the pulpit in a towering passion; but such an assertion cannot be justified as criticism.[3]

§ 260. Stress is sometimes laid upon the fact that the criticism is upon a *public* act, implying that it is the pub-

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the acts and conduct of the plaintiff in reference thereto and as a public character," and were published as such comments, and "without any malicious intent or malice whatever." Upon the trial, the jury gave a general verdict for defendant. On refusing a new trial, the court, Bovill, Ch. J., said: Mr. Odger is essentially a public man. This being so, editors of public newspapers may comment in the strongest possible way upon what he says and does in that character. As for the ridicule complained of, that is often the strongest weapon in the hands of a public writer, and if it be used fairly, the presumption of malice which would otherwise arise is rebutted. And *per* Grove, J.: If mere ridicule of a public man were enough to support an action for libel, every public newspaper—especially every comic newspaper—would be perpetually subject to have an action brought against it. The fact is, that public men must put up with laughing, caricaturing, and sneering. . . . Unless every electioneering squib is to be made the subject of an action, I do not see how we can possibly interfere. And, by Denman, J.; The plaintiff is a public man, and as such is *prima facie* the proper subject of public comment; see Bays *v.* Hunt, 60 Iowa, 251.

[1] It is no defence for gross libel, on a man's private character, that he was chairman of a political convention (Barr *v.* Moore, 87 Penn. St. 385), nor that is for the public good. (Bourresseau *v.* Detroit Ev. Press, 30 No. West. Rep. 376; Larrabie *v.* Minnesota Tribune Co. 36 Minn. 141.)

[2] See Popham *v.* Pickburn, 7 Hurl. & Nor. 891; *ante*, §§ 163, 241, and note 8, p. 175.

[3] Walker *v.* Brogden, 19 C. B. N. S. 65.

licity of the act upon which the right of comment depends. We shall not attempt to distinguish between public and private acts, because we are of the opinion that it cannot directly make any difference in the right to criticise, whether the act be done privately or publicly.[1] It was this supposed distinction between public and private acts which occasioned the dubiety on the question whether a sermon, not otherwise published than by its delivery from the pulpit, by a minister to his congregation, was the subject of criticism.[2] A churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church, by allowing books to be sold in it during the service, and by turning the vestry-room into a cooking apartment, the correspondence was published without the permission of the plaintiff, in the defendant's newspaper, with comments on the plaintiff's conduct. Held, that the correspondence involved a subject of *public* interest, which might be made the subject of public discussion, and the publication of the correspondence was not actionable, unless the language used was stronger than the limits of fair criticism allow.[3] Upon principle, private acts are, equally with public acts, the subject of criticism. But whether the act be a public or a private act may make a difference in determining whether the criticism was in good faith.

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[1] We suggest that the distinction should be not between public and private acts, but between acts which it concerns the public to know, and those which it does not concern the public to know.

[2] Gathercole *v.* Miall, 15 M. & W. 319; 10 Jurist, 337; 7 Law Times, 89; 15 Law Jour. Rep. 179, Ex. In the same case it was held that the conduct of the vicar of a parish, in establishing a parochial institution for charitable purposes, by the rules of which all persons not members of the Church of England are excluded from the benefit of the charity, is not a public act nor the act of a public functionary, so as to entitle the public press or others to comment on it as such. A plea of fair comment; that the plaintiff's dealings with his tenants was a matter of public notoriety, and had formed the subject of a letter written to the plaintiff on behalf of the tenantry by the parish priest; and that the whole subject of the law of landlord and tenant was a matter of public interest and discussion—held that the plea stated no defense, and leave to plead it was denied. (Hogan *v.* Sutton, 16 Weekly Rep. 127.)

[3] Kelly *v.* Tinling, Law Rep. 1 Q. B. 699.

CHAPTER X.

CORPORATIONS.

Corporations are legal persons—Their rights and duties assimilated to those of natural persons—Can act only through agents—May carry on business, sue and be sued, and are liable for injuries committed by agents—Corporations may have a reputation—Language concerning corporations—Actions by corporations for libel—Corporations cannot be guilty of slander—May be guilty of libel.

§ 261. Corporations, whether aggregate or sole, are *legal persons.* Hitherto, attention has been directed *exclusively* to language published by, or which concerned *natural* persons or their affairs; it will now be in order to consider the rights and duties of *legal* persons or corporations in respect to the publication of language. The topic has been comparatively but little adjudicated, and to the decisions upon it the remarks contained in a former section (§ 15) appear peculiarly applicable. The great and ever increasing number of corporations, assuming all the functions of individuals, has created a tendency in the modern decisions to assimilate, so far as possible, the rights and duties of corporations to the rights and duties of natural persons.[1] It is the distinctive feature of a corporation that it can act *only* by or through its officers or agents;[2] for even in the case of a corporation sole, the individual who represents that corporation, and the corporation, are

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[1] Conro *v.* Port Henry Iron Co. 12 Barb. 28.

[2] First Baptist Church *v.* Brooklyn Fire Ins. Co, 18 Barb. 69; Story on Agency, § 16.

distinct entities. Ordinarily, a corporation may acquire and possess property, and carry on business, and it may sue and be sued in like manner as an individual,[1] and is liable for an injury committed by its servants or agents, in all cases where, under like circumstances, an individual would be liable.[2] "If a corporation itself has no hands with which to strike it may employ the hands of others."[3] Accordingly, it has been held that an action lies against a corporation for malicious prosecution or for a trespass,[4] or for a libel.[5]

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[1] The Constitution of the State of New York provides (art. 8, § 3): All corporations shall have the right to sue, and shall be subject to be sued in all courts, in like cases as natural persons. Doubted if a foreign corporation—*i. e.*, foreign to the State in which the action is pending—could maintain action for libel. (Hahnemannian Life Ins. Co. *v.* Beebe, 48 Ill. 86.) Demurrer to complaint by a foreign corporation. (*Id.*)

[2] First Baptist Church in Schen. *v.* Schen. & Troy R. R. Co. 5 Barb. 80; and see Salt Lake City *v.* Hollister, 22 The Reporter, 353; Pritchard *v.* Corporation of Georgetown, 2 Cranch Cir. Ct. 191; Watson *v.* Bennett, 12 Barb. 196; New Haven R. R. Co. *v.* Schuyler, 34 N. Y. 30, 208; Hunter *v.* Hudson River Iron, &c. Co. 20 Barb. 507; Sharp *v.* Mayor of New York, 40 Barb. 273; Rochester White Lead Co. *v.* City of Rochester, 3 N. Y. 468; Green *v.* London Omnibus Co. 6 Jurist, N. S. 228; see *ante*, § 123.

[3] Railway Co. *v.* Harris, 122 U. S. 597.

[4] Eastern Counties Railway *v.* Broom, 6 Ex. 314; Roe *v.* Birkenhead Railway Co. 7 Ex. 36; Goodspeed *v.* East Haddam Bank, 22 Conn. 530; McFadzen *v.* Mayor of Liverpool, Law Rep. 3 Ex. 279. In Owsley *v.* Montgomery, &c. R. R. Co. 37 Ala. 560, it was held, but as we conceive erroneously, that a corporation, although liable for false imprisonment, was not liable for malicious prosecution; and in Childs *v.* State B'k of Mo. (17 Mo. 213), it was held that neither an action for malicious prosecution, for slander, nor for false imprisonment, could be maintained against a corporation. (And see Stevens *v.* Midland Counties R'way, 10 Ex. 355; Gillett *v.* Mo. Valley R. R. Co. 55 Mo. 315; and particularly Lord Bramwell's opinion in Abrath *v.* No. East. R. R. Co. 55 Law Times Rep. N. S. 63; commented on 34 Alb. Law Jour. 302.) Notwithstanding these decisions, there is now no doubt but that corporations are liable for malicious prosecutions. Indeed it has been held that a corporation is liable for the malicious prosecution of a civil action. (Brown *v.* City of Girandeau, 23 The Reporter, 309.) And for a conspiracy to injure a rival corporation. (Buffalo Oil Co. *v.* Standard Oil Co. 106 N. Y. 669; and see Hussey *v.* King, 25 The Reporter, 17.) A corporation may be indicted for libel. (State *v.* Atchison, 3 Lea, 729.)

[5] Phil. R. R. Co. *v.* Quigley, 21 How. U. S. R. 202; Aldrich *v.* Press Print. Co. 9 Minn. 133; Lawless *v.* Anglo-Egyptian Cotton Co. Law Rep. 4 Q. B. 262; Maynard *v.* Fireman's Ins. Co. 34 Cal. 48; Latimer *v.* West. Mor. News. Co. 25 Law Times, N. S. 44; see Atlantic Glass Co. *v.* Paulk, 3 So. Rep. 800; McArthur *v.* Detroit, &c. 16 Mich. 447; Evening Journal Ass. *v.* McDermott, 15 Vroom (N. J.) 430; Johnson *v.* St. Louis Dispatch Co. 65 Mo. 539; Home Machine Co. *v.* Sonder, 58 Ga. 64; Dodge *v.* Bradstreet

While a corporation is liable to an action for libel, neither the president, nor any other officer of the corporation is *personally* liable for any act of the corporation in which he has not personally participated.[1]

Laws of New York, 1849, ch. 258, authorized seven or more persons to unite as a joint stock association with certain corporate rights and liabilities, amongst others to sue and be sued in the name of the president of the association; where such an association published a newspaper, it was held that an action for a libel published in such newspaper may be maintained against such association in the name of its president.[2]

§ 262. A corporation, like an individual, may have a reputation, and a good reputation is equally as valuable to a corporation as to a natural person;[3] and as an individual may sustain injury by language affecting his reputation, so in like manner may a corporation. As in regard to language affecting individuals, we distinguish between language concerning the person as such, and language concerning the person in a trade, and language concerning a thing or the affairs of a person; so in regard to language affecting

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Co. 59 How. Pr. R. 104; McDermott *v.* Ev. Jour. Asso. 14 Vroom, N. J. 488; Bacon *v.* Mich. Cent. R. R. 19 The Reporter, 83. S., the general manager of defendant's railroad, without special instructions from the directors, dismissed plaintiff, a conductor, for alleged dishonesty. By direction of S., placards describing the offense, and stating plaintiff's dismissal, were posted in the company's private office (in some of which they were seen by strangers), and in circular books of the conductors—held defendant was liable for the acts of S., but that the publication was privileged. (Tench *v.* Gt. West. Rwy. Co. 33 Up. Can. Q. B. Rep. 8; rev'g 32 *Id.* 452.) In New York, by statute (Laws, 1860, ch. 90), a married woman may maintain an action in her own name, against any "body corporate," for any injury to her person or character, the same as if she were sole.

[1] Fanning *v.* Osborne, 3 Cent. Rep. 453; 102 N. Y. 441; Nevin *v.* Spieckemann, 4 Atl. Rep. (Pa.) 497; and see *ante*, p. 449.

[2] Van Aernam *v.* Bleistein, as Pres't, &c., 102 N. Y. 355; 2 N. Y. State Rep. 470, and 32 Hun, 316; *sub nom.* Van Aernam *v.* McCune. A stipulation in such an action admitting that the association was under the law of 1849, and that the defendant is its president, impliedly admits the association consists of the requisite number of members, and that the action is well brought against the president.

[3] Trenton Ins. Co. *v.* Perrine, 3 Zabr. 402.

corporations, we must distinguish between language concerning a corporation for different objects, as those engaged in manufacturing, trading, or banking, and those not so engaged, and language concerning the things of a corporation. Of course, language concerning the corporators is not within the scope of the present chapter. Language concerning a corporator comes within the rules relating to defamation concerning an individual. Where the defendant published, with other defamatory matter, that his hat had been stolen by *some* of the members of No. 12 Hose Company, the hose company was a volunteer association, and the members of the association brought a joint action for this publication; held, that the action could not be maintained.[1]

§ 263. Language concerning a corporation not engaged in any business, can hardly occasion, and certainly does *not necessarily* occasion it, any pecuniary injury; therefore, in regard to language concerning such a corporation, no action can be maintained, except upon proof of special damage; but as regards a corporation engaged in manufacturing, trading or banking, or other occupation in which credit may be material to its success, there language concerning such a corporation calculated to injuriously affect its credit, must *necessarily* occasion it pecuniary injury, and in such a case an action may be maintained by the corporation without proof of any special damage.[2] Thus, as regards language concerning corporations, some is actionable *per se*, and some is actionable only by reason of special damage.

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[1] Giraud *v.* Beach, 3 E. D. Smith, 337.

[2] A corporation engaged in business, in which credit is material to its success, may maintain an action of libel, without proof of special damage where the language used concerning it is defamatory in itself, and injuriously and directly affects its credit, and necessarily and directly occasions pecuniary injury; but in all other cases the averments and proofs of malice and special damage are necessary. (Mutual Reserve Fund Life Association *v.* The Spectator Co. 50 Supr. Ct. [18 J. & S.] 460.)

§ 264. In the case of an action by a corporation, a mutual life insurance company, against the editor of a newspaper, for libel in charging that the affairs of the company were mismanaged, it was alleged that the words were published of and concerning the company in their business, and of and concerning the directors of the company, and of and concerning the president, vice-president and secretary of the company, and of and concerning the property and concerns of the company, and of and concerning the conduct and management of the property and concerns of the company by the aforesaid directors and officers of the company; and special damage was charged to have resulted to the company in a loss of its business and a diminution of its profits. On demurrer to the complaint, it it was held that "a corporation aggregate may maintain an action for a *libel* for words published of them concerning their trade or business, by which they have suffered special damage." And that, "in alleging special damage, it is not always necessary to name the customers whose business has been lost by the defamation; but if the nature of the business is such as to render that impracticable, the loss of the business may be alleged generally."[1] In another case it was held that a joint stock company, incorporated under the statutes 19 and 20 Vict. ch. 47, might maintain an action for libel, and that, too, against a shareholder in the company.[2] And in that case it was said there may be particular kinds of libel which do not affect a corporation; but if injury ensues, an action may be maintain-

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[1] Trenton Ins. Co. *v.* Perrine, 3 Zabr. 402. Not actionable to publish of an insurance company that it proposes to pay over thirty per cent. interest to the stockholders before providing for its liabilities, and that it is unworthy of confidence. (Hahnemannian Life Ins. Co. *v.* Beebe, 48 Ill. 87.) "A free criticism of the charter of an insurance company, or of any other incorporation which claims the confidence of the public and seeks the possession of its funds, is to be encouraged rather than repressed." (Lawrence, J., *Id.*)

[2] Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 Hurl. & Nor. 78, 146.

ed. Where the defendant published in a periodical that the plaintiff, an incorporated bank, "was liable at any time to be closed up by an injunction," the plaintiff brought an action for libel, alleging that since the publication divers persons had refused to receive the notes of the plaintiff, and had refused to deal with it. To this complaint there was a demurrer; the demurrer was overruled, and it was held that a good cause of action was alleged without any allegation of special damages, that the law recognized the right of a corporation to its property as effectually as in the case of an individual. An appeal was taken to the general term, where the decision was affirmed.[1] Where an act of Parliament, after reciting the difficulties experienced by joint stock companies in suits for recovering debts and enforcing obligations, and in the prosecution of offenders, enacted that actions commenced by the Hope Company for recovering debts, enforcing claims or demands then due, or which thereafter might become due or arise to the company, might be commenced, and indictments for offenses be preferred, in the name of the chairman; held, that the chairman might sue for a libel on the company, although it was not a corporate body.[2]

§ 265. As a corporation can act only by or through its officers or agents (§ 261), and as there can be no agency to slander (§ 57),[3] it follows that a corporation cannot be guilty of slander; it has not the capacity for committing that wrong.[4] If an officer or an agent of a corporation is guilty of slander, he is personally liable, and

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[1] Shoe and Leather Bank *v.* Thompson, 18 Abb. Pr. Rep. 413.

[2] Williams *v.* Beaumont, 10 Bing. 260; 3 M. & Sc. 705; and see Woodward *v.* Cotton, 1 Cr. M. & R. 44.

[3] Moloney *v.* Bartley, 3 Camp. 210; Hecker *v.* DeGroot, 15 How. Pr. R. 314; and note 1, p. 54, *ante*.

[4] See dictum to the contrary, Gilbert *v.* Chrystal Lodge, 4 So. East. Rep. 905.

no liability results to the corporation. But as all concurring in the authorship or publication of a libel are alike responsible as publishers (§§ 115, 117, and note 1, p. 95), there is nothing to prevent a corporation from being, *in law*, the publisher of a libel, and from being held liable as such publisher. A corporation may sanction the publication of a libel, and, in such a case, the corporation is the publisher of the libel, and liable in like manner as an individual; not because, as is sometimes said, a corporation may act with malice, but because it has a capacity for voluntary action, and is responsible for such action.[1] It is as possible for a corporation as for an individual to act maliciously, *i. e.*, with a bad intent.[2] Accordingly it has been held, that a corporation aggregate may, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice in law sufficient to support the action; and there may be cir-

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[1] A corporation is liable in an action for a libel published by its agent, in excess of its authority, though in the course of the company's business. (Fogg *v.* Boston and Lowell R. R. Co. 20 No. East R. [Mass.] 109.) Where a libelous article indicating that a neighboring ticket broker is not reliable, is conspicuously posted 40 days in a ticket office of a railroad company whose principal office and terminus are in the same city, and there is evidence that such office is used to publish general information of interest to purchasers of tickets, the jury may find that the company had knowledge of the character of the notices posted in its ticket office, and that the libel would not have remained posted so long had not the company authorized or ratified it. (*Id.*)

Defendant was a foreign corporation doing business in Canada, with a branch office at Winnipeg. Plaintiff had been employed for a few weeks at a branch office in Toronto, and came to Winnipeg seeking employment, and was engaged by the managers of the Winnipeg branch as city collector. The Toronto manager wrote two letters respecting plaintiff to the Winnipeg manager, which letters, plaintiff alleged, were libelous, and for which this action was brought. Plaintiff admitted that being written from one servant of defendant to another, respecting a subordinate, they were *prima facie* privileged, but claimed that the language was such as to furnish evidence of express malice, and that the excess was not privileged. Held, there being no evidence that the corporation or the directors or the managing board, authorized or had any knowledge of the letters being written, that the defendant was not liable. (Freeborn *v.* The Singer Sewing Machine Co. 2 Manitoba Law Reports, 253.)

[2] Reed *v.* Home Savings B'k, 136 Mass. 445; 2 Addison on Torts, 73; Buffalo Oil Co. *v.* Standard Oil Co. 3 N. Y. St. Rep. 450, 453; 8 *Id.* 877; 42 Hun, 153; 106 N. Y. 669.

cumstances by which malice in fact might be proved, such as to make a corporation aggregate liable in its corporate capacity, for such malice in fact.[1]

[1] Whitfield *v.* South-East. R. R. Co. 1 Ell. B. & E. 115; Aldrich *v.* Press Printing Co. 9 Minn. 133; Alexander *v.* N. East. R. R. Co. 34 Law Jour. Rep. N. S. 152, Q. B.; 11 Jurist, N. S. 619; R. R. Co. *v.* Quigley, 21 How. U. S. 202; R. R. Co. *v.* Conybeare, 9 Ho. Lords Cas. 711. Exemplary damages against a corporation. (Jeffersonville R. R. Co. *v.* Rogers, 28 Ind. 1; Caldwell *v.* N. Y. Steam Boat Co. 47 N. Y. 282.) A corporation of *itself* cannot be guilty of fraud, but where it can only accomplish the object for which it is formed, by the agency of others who act fraudulently, the corporation stands in the same situation, with respect to the conduct of its agents, as an individual. (Ranger *v.* Gt. Western Railway Co. 5 Ho. Lords Cas. 72.) Proof of publication by a corporation. (De Senancour *v.* Soc. La Prevoyance, 16 No. East. Rep. 553.)

PART II.

REMEDY BY ACTION

FOR THE WRONGS CALLED

SLANDER AND LIBEL.

CHAPTER XI.

PROCEEDINGS IN AN ACTION.

Action, how commenced—Within what time—In what court—Attachment—Holding defendant to bail—Execution against the person—Security for costs—Consolidating actions—Place of trial—Inspection and discovery—Assessment of damages where no answer interposed—Mode of trial—Struck jury—Refusing to try—Compromise—Right to begin—Address of counsel—Reading libel to jury—Evidence for plaintiff—Abandonment of one of several causes of action or defense—Province of the court and jury—Damages—Verdict—New trial—Costs—Staying proceedings until costs of former action paid.

§ 266. The preceding chapters of this essay have been devoted to a consideration of *the law* relating to the wrongs called slander and libel. We have now to treat of *the remedy by action* for these wrongs. The diversity of the procedure in the courts of the several States, renders it impossible to compress within any convenient space, or into any convenient form, the practice, pleadings, and proceedings in actions in all the States. To trace in detail the whole proceedings in an action in any one State, would be to exceed the limits of our subject. We purpose, therefore, to exhibit so much of the course of procedure in an action in the courts of the State of New York, as applies either exclusively to the action of slander or libel, or as may have been adjudicated upon. Our remarks, while they will more particularly refer to the State of New York, will occasionally extend to other States and to the practice

in the courts of England. As the Code of Procedure of the State of New York has been the model for the Codes of Procedure of other States, references to the Code of Civil Procedure of New York will have a wide field of practical utility. The topics of *Parties*, *Pleading*, and *Evidence* will be considered in subsequent chapters.[1]

§ 267. Libel, slander and malicious prosecution are included in the phrase "a personal injury."[2] The action for slander or libel is commenced by summons. The summons may be served by publication.[3] The action must be commenced within two years of the time of the publication,[4] and within the lifetime of the person affected by the

[1] An agreement not to permit the columns of a newspaper to be used for the publication of matter detrimental to the covenantee, held to be too vague to be enforced. (Fowler *v.* Hoffman, 31 Mich. 216.) In an unreported case against Walter Savage Landor (the author of "Imaginary Conversations," &c., &c.), one count in the declaration was on an agreement by defendant not to libel the plaintiff, and that he had broken said agreement.

[2] Code Civ. Pro. § 3343, subd. 5.

[3] Code Civ. Pro. § 438; see Waterhouse *v.* Hatfield, 9 Ir. L. R. 38.

[4] Code Civ. Pro. § 384. This means publication in a technical sense; thus where a libel was published in a newspaper and ten years afterward the plaintiff sent to the publisher for and obtained a copy of the newspaper; held the statute did not commence to run until the "publication" of the copy so obtained. (Brunswick *v.* Harmer, 14 Q. B. 185.)

Limitation of action where no damage occurs at the time of publication, but where subsequent damage arises. (Bonomi *v.* Backhouse, 1 El. Bl. & El. 622; cited Northrup *v.* Hill, 57 N. Y. 358.) If to a plea of limitation plaintiff reply that words were spoken within the prescribed time, he must prove the speaking within that time. (Huston *v.* McPherson, 8 Blackf. 562.) The period of limitation in the States is said to be (Merrill Newspaper Libel, 60): Arkansas and Connecticut, three years; Dakota, Florida, Idaho, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, Oregon, South Carolina, Vermont, Washington Territory, and Wisconsin, two years. In the other States and Territories, one year. In some States the period of defendant's absence from the State does not count in the time of limitation. In New York the absence must be of one year's duration not to count, and if the publication is made pending the absence of the defendant from the State, the time of limitation does not begin to run until his return to the State (Code of Civ. Pro. N. Y. § 401); and as to the effect of death of either the publisher or of the person affected by the alleged libel, and of the reversal of a judgment, see *Id.* §§ 402, 403, 404, 405.

See *post*, Parties, § 299. In some cases in England, the plaintiff must give notice of action. (See Norris *v.* Smith, 10 A. & E. 190; Beechey *v.* Sides, 9 B. & C. 806; Lidster *v.* Borrow, 9 A. & E. 654.) In an action for slander against one who held the office of clerk of a market, the defense that no notice of action had been given prevailed, on the ground that the words spoken was a *thing done*.

defamatory matter (§ 299); it cannot be brought in a court of a justice of the peace.[1] It may be brought in the City court of the city of New York, if the damages *claimed* do not exceed $2,000. And in cases which might be brought in the City court of New York, if the action is brought in any other court, the plaintiff can recover only City court costs.[2] The plaintiff in an action for slander or libel cannot issue an attachment against the property of the defendant,[3] but the defendant, whether male or female, may be arrested and held to bail at the commencement of the action, or at any time before judgment therein;[4] and after the return unsatisfied of an execution against the property of the defendant, an execution may issue against his person,[5] even in case of an infant defend-

(Murray *v.* McSwiney, Ir. R. 9 Com. Law, 545; see *ante*, p. 62, note.)

[1] Code Civ. Pro. § 2863. Transfer of actions for libel and slander to County Courts in England, 9 and 10 Vict. ch. 95; 12 and 13 Vict. ch. 101; 13 and 14 Vict. ch. 61; 15 and 16 Vict. ch. 54. By consent (19 and 20 Vict. ch. 108), or by remission from a Supreme Court. (30 and 31 Vict. ch. 142; Stokes *v.* Stokes, 19 Q. B. D. 419.)

[2] Laws of N. Y. 1853; p. 1165; Murray *v.* De Gross, 3 Duer, 668; as we understand it there is now no difference between Supreme Court and City Court costs. In New York if plaintiff recover less than $50, the amount of costs cannot exceed the amount of damages. (Code Civ. Pro. § 3229.) In California, plaintiff is not entitled to costs unless he obtains $300 damages. (Jacobi *v.* Baur, 55 Cal. 554.) In England, on recovery of one farthing damages, there being no order and no certificate, no costs allowed. (Garret *v.* Bradley, 1 Ex. D. 349; overruling Parsons *v.* Tinling, 2 C. P. D. 119.) Statutes provided: Any court of record in the city of New York, might send any action of libel or slander pending in said court and at issue, to the Marine, now city court, for trial. (See Laws 1871, p. 1817; Laws 1870, p. 1346; Laws 1872, ch. 629; Laws 1874, ch. 545.) But these provisions were held to be unconstitutional. (De Hart *v.* Hatch, 6 Sup. Ct. Rep. [T. & C.] 186; 3 Hun, 375.)

[3] And so in South Carolina. (Sargent *v.* Helmbold, Harper, 219.)

[4] N. Y. Code Civ. Pro. §§ 549, 553. In England the holding to bail in libel is of very rare occurrence. (Folkard, Stark. Slan. 548.) In New York city, the practice of holding to bail in actions for libel or slander is now discouraged by the courts. (See Knickerbocker Ins. Co. *v.* Ecclesine, 6 Abb. Pr. Rep. N. S. 9; 34 N. Y. Superior Co't, 76; Butts *v.* Burnett, 6 Abb. Pr. Rep. N. S. 302; but see Britton *v.* Richards, 13 *Id.* 258; Blakelee *v.* Buchanan, 44 How. Pr. R. 97.) A statute allowing arrest in an action for libel, does not violate a constitutional provision that "there shall be no imprisonment for debt except in cases of fraud." (Moore *v.* Green, 73 No. Car. 394.)

[5] Code Civ. Pro. § 1487; see Baker *v.* Swackhamer, 5 How. Pr. Rep. 251; Straus *v.* Schwarzwaelden, 4 Bosw. 627; Brooks *v.* McLellan, 1 Barb. 247; Davis *v.* Scott, 15 Abb. Pr. Rep. 127; Peareson *v.* Picket, 1 McCord, 472; Newton *v.* Rowe, 8 Scott N. R. 26; Defries *v.* Davies, 3

ant.[1] A married woman sued with her husband may be held to bail.[2] If the plaintiff fails in the action, a judgment against him for the costs may, after an execution against his property has been returned unsatisfied, be enforced by an execution against his person.[3] The plaintiff may be required to give security for costs, as in other actions.[4] Actions for slander or libel may be consolidated.[5]

§ 268. The actions of slander and libel are of the kind known as *transitory*.[6] The place of trial (the venue) should be the county in which the parties, or some of them, reside; or if none of the parties reside in the State, then in any county the plaintiff may designate,[7] subject in every

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Dowl. Pr. Cas. 629. A defendant in custody on an execution for damages in slander or libel, is not discharged therefrom by the English bankrupt law; see 1 Doria & McCrea's Law of Bankruptcy, 349. Query as to the United States bankrupt law.

[1] Defries *v.* Davies, 3 Dowl. Pr. Cas. 629. Defendant in an action for slander, aged 15 years, was taken in execution for the damages and costs, and the court refused to release him. (*Id.*)

[2] Schaus *v.* Putscher, 25 How. Pr. Rep. 436.

[3] Kloppenberg *v.* Neefus, 4 Sandf. 655. And on judgment for defendant in an action for libel by husband and wife, execution may go against the person of the wife. (Newton *v.* Boodle, 9 Q. B. 948; 11 Jur. 628; and see Newton *v.* Rowe, 8 Scott N. R. 26.)

[4] Court refused to increase amount of security to cover expenses of foreign witnesses. (Pizani *v.* Lawson, 5 Sc. 418.) By Statute 30 and 31 Vict. ch. 142, § 10, it is enacted that in actions of malicious prosecution, ... slander, seduction, or other action of tort brought in a superior court, the plaintiff may be required to give security for costs, or satisfy a judge that he has a cause of action, otherwise the action is to be remitted to the county court. In California, plaintiff in an action for libel or slander must in all cases give security for costs (Code Civ. Pro. § 460), and the same law prevails in some other States, and in Ontario, Canada.

[5] See an instance, Whitely *v.* Adams, 15 C. B. N. S. 392; 10 Jurist. N. S. 47; Percy *v.* Seward, 6 Abb. Pr. R. 326. The court refused to consolidate actions for the same libel, one against the publisher and the other against the editor of the newspaper in which the libel was published. (Cooper *v.* Weed, 2 How. Pr. Rep. 40.) Where A. and B. having recovered in separate actions against different parties engaged in the publication of the newspaper in which the libel was published, commenced other actions against the same parties, each suing the party against whom the other had recovered, the court, on motion, refused to stay the proceedings in the second actions. (Martin *v.* Kennedy and Banning *v.* Perry, 2 Bos. & Pul. 69. See Jones *v.* Pritchard, 6 Dowl. & L. 529; 18 Law Jour. 104, Q. B.; *ante*, note 7, p. 161.)

[6] Hull *v.* Vreeland, 42 Barb. 543; Owen *v.* McKean, 14 Ill. 459; Teagle *v.* Deboy, 8 Blackf. 134; and see Wickham *v.* Baker, 4 Blackf. 517; Emmerson *v.* Marvel, 55 Ind. 265, *ante*, § 110, and note.

[7] Code Civ. Pro. § 984. Formerly it was a ground for arresting or setting aside the judgment if the *venue* was

case to the power of the court to change the place of trial.[1] The court has power in its discretion to order the plaintiff's attorney to disclose to the defendant the place of residence of the plaintiff.[2]

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laid in the wrong county. This was altered by the statutes 16 and 17 Car. II, ch. 8; 4 Anne, ch. 16; Clerk *v.* James, Cro. Eliz. 870; Craft *v.* Boite, 1 Saund. 241.

[1] Code Civ. Pro. § 987. As to changing *venue*, see Phillips *v.* Chapman, 5 Dowl. Pr. Cas. 250; Ryder *v.* Burke, 10 Ir. Law. Rep. 476; Robson *v.* Blackman, 2 Dowl. Pr. Cas. 645; Clements *v.* Newcombe, 1 Cr. M. & R. 776; 3 Dowl. Pr. Cas. 460; Pybus *v.* Scudamore, 7 Sc. 124; Hobart *v.* Wilkins, 1 Dowl. Pr. Cas. 460; Wheatcroft *v.* Mousley, 11 C. B. 677; Pinkney *v.* Collins, 1 T. R. 571; Clissold *v.* Clissold, 1 T. R. 647; Metcalfe *v.* Markham, 3 T. R. 652; Barnes *v.* Holloway, 8 T. R. 150; Hitchon *v.* Best, 1 Bro. & B. 299; Lucan *v.* Cavendish, 10 Ir. Law. Rep. 536; Callaher *v.* Cavendish, 3 Ir. Law Rep. 375; Root *v.* King, 4 Cow. 403; Shaftsbury's Case, 1 Vent. 364; Greenslade *v.* Ross, 3 Dowl. Pr. Cas. 697; Tallent *v.* Morten, 1 M. & P. 188; Cossham *v.* Leach, 32 Law Times Rep. 665. Where a paper is traced to the possession of a party, it is presumed to continue with him and he must account for it. (Perrow *v.* Lindsay, 52 Hun, 115.)

Where the application is on special grounds, it should not be made until after issue joined. (Hodge *v.* Churchward, 5 C. B. 495; Griffin *v.* Walker, 7 Sc. 846.) The *venue* changed after a nonsuit. (Price's notes, Points of Pr. 177.) It was held no ground for changing the *venue* in an action for libel published in a local newspaper, that the defendant, the proprietor of the paper, possessed much influence in the county in which the *venue* was laid, and had, since the commencement of the action, evinced a disposition to use it to the prejudice of the plaintiff. But the court intimated that they would interfere if the defendant should before the trial publish anything in relation to the matter of the action reflecting upon the plaintiff. (Walker *v.* Brodgen, 17 C. B. N. S. 571.)

[2] Worton *v.* Smith, 6 Moore, 110; Johnson *v.* Berley, 5 B. & Ald. 54; Ninety-Nine plaintiffs *v.* Vanderbilt, 1 Abb. Pr. Rep. 200. In an action for libel defendants, before service of any complaint and without showing any "exigency" therefor, moved for an order that plaintiff's attorney furnish "a sworn statement showing residence, occupation and present address of plaintiff," &c., "that defendant might be enabled to examine plaintiff before trial." The motion was denied and the denial was affirmed at General Term, on the ground that the granting or refusing it was within the discretion of the judge below, and it did not appear to be wrongly exercised. (Corbett *v.* De Comeau, 45 N. Y. Superior Co't, 588.) Another motion in the same action to compel plaintiff's attorney to disclose plaintiff's address, was denied because no specific object for obtaining the order was disclosed. A third motion was made showing facts raising a presumption that plaintiff was a non-resident, that he was not cognizant of the pendency of the action, that defendant desired to examine plaintiff as a witness, before trial, upon the trial, or by commission, as to whether or not he was willingly plaintiff and the real party in interest; that plaintiff was insane; that the allegations of the alleged libel were true; to secure plaintiff's attendance at the trial, that the jury might see him and judge of his manner, and appearance, and, lastly, to obtain security for costs if plaintiff was a non-resident. An order was made that plaintiff's attorney disclose the residence, occupation and business address of plaintiff and stay of proceedings until such disclosure made. This order was affirmed on appeal (*Id.* 637), on

§ 269. In certain cases, either party is entitled to the production and inspection of documents in the possession or control of his adversary.[1] Where, in an action for a libel, the plaintiff moved for an order upon the defendant to deliver to him a copy of a printed book in his, defendant's possession, in order to enable him, plaintiff, to prepare his complaint in the action—*per curiam:* without expressing any opinion as to the propriety of compelling a defendant, in an action for a libel, to deliver to the plaintiff a copy of the libel, I am clearly of the opinion that this motion should not be granted, because: 1. The affidavits do not show what is stated in the book of which the plaintiff seeks a discovery, and therefore the court cannot decide whether it is material or not. 2. Because the affidavits do not specify any particular information desired, so that the court could order a sworn copy to be delivered. 3. Because plaintiff is not entitled to the whole book, but only to the particular article on which his action is founded.[2] Upon an application in an action for libel, for leave to examine a defendant before service of any complaint, the court much doubted the propriety of exercising the power of the court to enable the plaintiff to obtain facts upon which to frame his complaint.[3] And in

authority of Corbett *v.* Gibson (18 Hun, 49).

[1] Code Civ. Pro. § 803; 2 Rev. Stat. of N. Y. 199; Court Rule, 15. And under the English common law procedure act. (Collins *v.* Yates, 27 Law Jour. 150, Ex.)

[2] Lynch *v.* Henderson, 10 Abb. Pr. R. 345, note. A document referred to in an alleged libel may be ordered produced, and submitted for inspection, where such submissions and inspection do not tend to criminate the party against whom they are produced. (Kraus *v.* Sentinel Co. 23 No. West. Rep. 12.)

[3] Keeler *v.* Dusenbury, 1 Duer, 661. A plaintiff asked leave to examine witnesses to prepare her complaint, on the ground that she believed the parties she sought to examine had said something against her; application denied. (Donohue, J., *Re* Stevens, Oct. 10, 1884.) In an action against the publisher of a newspaper for a libel contained in a letter from a correspondent, and in a leading article thereon, defence was that alleged libel consisted of an accurate report of certain public proceedings, and fair comment thereon; held, that plaintiff was not entitled to interrogate defendant as to the names of the persons on whose information the reports were based, nor the name of the correspondent who wrote the letter; nor as to the original manuscript of the letter. (Hennessy *v.* Wright, 36 Week.

an action against certain individuals named, and certain others not named (except by fictitious names), for, a libel in a newspaper of which the defendants named, with the others not named, were alleged to be the proprietors, the plaintiff alleged that the names of the proprietors were unknown to him, and that it was pretended that the newspaper was the property of a corporation, and asked for an inspection of the books of such corporation to enable him to ascertain the true names of the proprietors of the newspaper. The application was denied.[1]

§ 270. In England, a bill of discovery is allowed in certain cases in an action for libel,[2] and interrogatories may be exhibited to ascertain the precise words used,[3]

Rep. 879). As to examination of parties to suits to obtain information to be used by the adverse party, see N. Y. Code of Civ. Pro. § 872; *et seq.*, and see Strakosch *v.* Press Pub. Co. 25 N. Y. St. Rep. 189; Dudley *v.* Press Pub. Co. *Id.* 32. In an action for libel, defendant may, before the trial, examine plaintiff as a witness. (Ball *v.* Even. Post Pub. Co. 12 N. Y. Civ. Pro. Rep. 4.) An order to examine defendants to enable plaintiff to prepare his complaint, and to ascertain the names of the persons who prepared and procured to be published the alleged libels in order that they may be made defendants, was reversed on appeal. (Brandon Manuf. Co. *v.* Bridgman, 14 Hun, 122.)

[1] Opdyke *v.* Marble, 44 Barb. 64; and see McCue *v.* Tribune Asso. 1 Hun, 469.

[2] By statute, 6 & 7 W. IV, and 32 & 33 Vict., authority is given to file a bill of discovery of the name of any person concerned as printer, publisher or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper, in order to bring or carry on any suit for libel. As to a bill of discovery in aid of an action for libel, not necessary since the fusion of law and equity, see Macaulay *v.* Shackell, 1 Bli. N. S. 96; 2 Sim. & St. 79; Wilmot *v.* MacCabe, 4 Sim. 263; March *v.* Davison, 9 Paige, 580; Stat. 32 Geo. III, ch. 60; Stewart *v.* Nugent, 12 Legal Observer (London), 210; Dixon *v.* Enoch, Law Rep. 13 Eq. Cas. 394. The proceeding for an examination of a party to the action are a substitute for a bill of discovery under the former modes of procedure. (King *v.* Leighton, 58 N. Y. 383; Glenney *v.* Stedwell, 64 N. Y. 120.) Where it appears from the moving papers that every issue, upon which the party is shown to be material and necessary, involves matter, and that only in respect to which he is privileged, an examination should be refused. (Brandon Manuf. Co. *v.* Bridgman, 14 Hun, 122; Phœnix *v.* Dupuy, 2 Abb. N. C. 146; Kinney *v.* Roberts, 26 Hun, 166.) But if the moving papers show that there are matters respecting which the moving party has a right to examine his adversary other than and in addition to matter as to which he is privileged from answering, then an order for his examination may be made. Leaving him to assert his privilege when the objectionable question is put to him. (Corbett *v.* DeCormeau, 54 How. Pr. Rep. 506; Kinney *v.* Roberts, 26 Hun, 166.)

[3] Atkinson *v.* Fosbrooke, Law Rep.

but the court refused to permit a plaintiff to exhibit interrogatories to the defendant, the answers to which, if in the affirmative, would tend to show that he composed or published the libel, and would therefore criminate him.[1] In an action for imputing to the plaintiff that he was the author of a scandalous letter, which the defendant in his plea justified as true, the court allowed the plaintiff an inspection of the letter by certain witnesses, in order that he might be prepared to negative its being his handwriting,[2] and generally plaintiff is entitled to a discovery of all documents in defendant's possession which would aid him, plaintiff, in rebutting a justification.[3] A discovery from plaintiff of the truth of an alleged libel may be compelled, when such discovery will not subject him to a criminal prosecution or to a penalty or forfeiture, or render him infamous.[4]

The rule which excuses a person from answering a question which may tend to convict him of a crime excuses him from producing books or documents which may tend

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1 Q. B. 628; 14 Law Times, N. S. 553; 17 & 18 Vict. ch. 125; 32 & 33 Vict. ch. 24; see note to § 379, *post;* also Lamb *v.* Munster, 10 Q. B. D. 110; Jones *v.* Richards, 15 *Id.* 439; Marriott *v.* Chamberlain, 17 *Id.* 154; Greenfield *v.* Reay, 10 *Id.* 217; Bustros *v.* White, 1 *Id.* 423; Proctor *v.* Smiles, 55 L. J. Q. B. 527 C. A.; Malone *v.* Fitzgerald, 18 Law. Rep. Ir. 187; Atherley *v.* Harvey, 2 Q. B. D. 524. In interrogating an adversary before trial you may get at the facts relied upon, but not the evidence of those facts. (Eade *v.* Jacobs, L. R. 3 Ex. Div. 335; Bradbury *v.* Cooper, 53 Law Jour. Rep. Q. B. 558.)

[1] Tupling *v.* Ward, 6 Hurl. & Nor. 749; Edmunds *v.* Greenwood, Law Rep. 4 C. P. 70; but see Baker *v.* Lane, 3 Hurl. & Colt. 544; 34 Law Jour. N. S. 57 Ex.; 10 Jurist, N. S. 117; 11 Law Times, N. S. 38, as explained in Bickford *v.* Darcy, Law Rep. 1 Ex. 354; 14 Law Times, N. S. 629; see also Stern *v.* Sevastopulo, 14 C. B. N. S. 737; Moor *v.* Roberts, 2 C. B. N. S. 671; Bartlett *v.* Lewis, 12 C. B. N. S. 249. When court will not review order allowing an interrogatory. (Inman *v.* Jenkins, 39 Law Jour. 258, C. P.) And as to interrogatories, see Osborn *v.* London Dock Co. 10 Ex. 698; Chester *v.* Wortley, 17 C. B. 410; see § 379, *post.* A defendant cannot be examined before trial to disclose his connection with the alleged libelous publication to enable plaintiff to draw his complaint. (Brandon Manuf. Co. *v.* Bridgman, 14 Hun, 122.)

[2] Curtis *v.* Curtis, 3 M. & Sc. 819.

[3] Collins *v.* Yates, 27 L. J. 150 Ex.

[4] Funk *v.* Tribune Asso. 4 Civ. Pro. Rep. 408, and to the like effect, see Webb. *v.* East, 5 Ex. Div. 23. But when does such a state of things occur?

to a like resullt.[1] But a party who objects to the production of a document for inspection on the ground that it may tend to incriminate him, must make the objection himself and make it on oath.[2] An objection to answer interrogatories which is made by affidavit on the ground of the tendency of the answer to criminate the person interrogated may be valid, although not expressed in any precise form of words, if from the nature of the questions and the circumstances such a tendency seems likely or probable. In an action for libel the defendant pleaded a denial of the publication, and to interrogatories asking him in effect whether he published the libel, he stated by his affidavit in answer: "I decline to answer all the interrogatories upon the ground that my answer 'might' tend to criminate me." Held, that his answer was sufficient.[3] In order to prove that defendant was the writer of a libelous letter, he may be interrogated as to whether or not he was the writer of another letter addressed to a third person—as leading up to a matter in issue in the cause, and therefore relevant.[4]

In an action for libel, a witness was shown the alleged libel in manuscript and was asked, did you write this paper; held, he was not compelled to answer.[5]

As there cannot be a criminal prosecution for slander different rules prevail in actions for slander than in actions for libel. In an action for slander plaintiff may ask defendant whether the words charged, or the substance of them, had been communicated to him by a third person, but may not ask the name of said third person.[6]

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[1] Fisher *v.* Ronalds, 12 C. B. 763.
[2] Webb *v.* East, 5 Ex. D. 23.
[3] Lamb *v.* Munster, 10 Q. B. D. 110.
[4] Jones *v.* Richards, 15 Q. B. D. 439.
[5] Simmons *v.* Holster, 13 Minn. 253.
[6] Daily Telegraph Co. *v.* Berry, 5 Vict. Law Rep. L. 343. The privilege of a party from testifying against himself extends to every case where the answer will have a tendency to expose him to a penal liability, or to any kind of punishment, or to a *criminal* charge (Clapper *v.* Fitzpatrick, 3 How. Pra. Rep. 314.) If the fact to which he is interrogated forms but

§ 271. In one case,[1] in an action for libel, the court ordered the defendant to produce certain documents in his possession for the inspection of the plaintiff. This was disapproved of in a subsequent case,[2] where an application for an order to inspect the manuscript of articles that had been published in a newspaper was denied. A motion to compel the defendants to declare to whom the defamatory matter was intended to apply was denied.[3]

§ 272. On the principle that before a party utters a slander he should be prepared to justify, it has been said that the courts will not give the defendant an inspection of documents in the possession of the plaintiff to enable the defendant to prepare a plea in justification; thus, where A. charged B. with forging an I O U, and B. sued A. in slander for uttering such charge, the court refused the application of the defendant for an inspection of the I O U, although he alleged that the I O U was in the possession of the plaintiff, that he (defendant) had reason

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one link in the chain of testimony which is to convict him, he is privileged and he need not explain how he might be criminated by the answer, and his swearing that to answer would have the effect of criminating him is sufficient to excuse him from answering. The privilege ceases and he must answer if the prosecution to which he might be exposed is barred by lapse of time (Henry *v.* Salina Bk. 1 N. Y. 86), or the prosecution is under a foreign law (King of Two Sicilies *v.* Wilcox, 15 Jurist, 214), or where he is protected by statute against the use of his testimony on a trial against him. (The People *v.* Kelly, 24 How. Pra. Rep. 369; *Re* Hackley, 24 N. Y. 74; Byass *v.* Smith, 4 Bosw. 679.) Laws of N. Y. ch. 742, provide: that no person shall be excused from testifying on any examination or trial, etc., or on the trial of any civil action for slander or libel, or any criminal action for libel where such alleged slander or libel imputes bribery or any offense mentioned in this act. (See The People *v.* Sharp, 107 N. Y. 427.) The statute 32 and 33 Vict. ch. 24, which requires a defendant, being printer, proprietor or publisher of a newspaper, to admit or deny his being printer, proprietor or publisher. (Lefroy *v.* Burnside, 4 Law Rep. Ireland, 340.) This statute, it has been held, does not apply to an editor, or an author. (Carter *v.* Leeds Daily News, 11 Weekly Notes, 11; Odgers on Libel, 513, *et seq.*) The foregoing statute does not make it obligatory upon a defendant, the publisher of a newspaper, to answer the question, were you the writer (of the libel complained against), if not, do you know who wrote it? (Smith *v.* Powell, 10 Vict. Law Rep. 79.; see *post*, § 379.)

[1] Perrott *v.* Morris, 8 Irish Jurist, 334.

[2] Finlay *v.* Lindsay, 7 Irish Com. Law Rep. 1.

[3] Giraud *v.* Beach, 3 E. D. Smith, 337.

to believe it was in reality a forgery, and that he could not safely plead without inspecting it.[1] Where an order had been made in an action of libel, giving the defendant leave, under 14 & 15 Vict. ch. 99, § 6, to inspect the books of the plaintiff, a motion by the defendant to extend the time to make the inspection was denied, on the ground that the order for inspection ought never to have been made—and *per curiam:* A man who publishes a libel should be in a position to prove it, and it would be a monstrous thing if a man could publish a libel, imputing insolvency to a mercantile house, and then to come to this court and ask for an order to inspect the plaintiff's books, in the hope of being able to get up a case. If the defendant is a shareholder, he has other means of obtaining an inspection, and we can only regard him as a defendant in an action for libel.[2]

§ 273. The power of the courts to order bills of particulars is not restricted; it extends to all descriptions of actions.[3] The principle upon which bills of particulars are ordered, is the advancement of justice, and the preventing surprise at the trial.[4] There appears to be, in the English courts, some difference in the practice as to ordering bills

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[1] Day *v.* Tuckett, 1 Bail Court Rep. 203; but see Browning *v.* Alwyn, 7 B. & C. 204, where an inspection was allowed. The same principle applied to an examination of plaintiff before trial. (Strakosh *v.* Press Pub. Co. 25 N. Y. St. Rep. 189.)

[2] Metro. Saloon Co. *v.* Hawkins, 4 Hurl. & Nor. 146; 1 Fost. & F. 413; see Steadman *v.* Arden, 15 M. & W. 587.

An examination of plaintiff before defendant has answered, to enable defendant to find out, in advance, whether or not he can, by the testimony of plaintiff, sustain a defense of truth, is not permitted. (Kinney *v.* Roberts, 26 Hun, 166, 172; Schepmoes *v.* Bousson, 1 Abb. N. C. 481; Winston *v.* English, 44 How. Pr. Rep. 398, 409; Beach *v.* Mayor, 14 Hun, 79; note to Glenny *v.* Stedwell, 1 Abb. N. C. 332.) In an action for slander, charging plaintiff, an unmarried woman, with being pregnant; defendant justified on the ground of truth, and then moved for an order that plaintiff submit to a medical examination to sustain the defense. The motion was denied. (Kern *v.* Bridwell, Ind. Sup. Co't, 40 Alb. L. J. 84; 50 Am. Rep. 156.)

[3] Cunard *v.* Francklyn, 19 N. Y. St. Rep. 641. Bill of particulars in action for malicious prosecution. (Lane *v.* Williams, 37 Hun, 388.)

[4] Tilton *v.* Beecher, 59 N. Y. 190, an exhaustive review of the subject.

of particulars, between actions for slander and actions for libel.[1] It is almost of course in an action of slander, unless the complaint alleges the place where, the time when, and the names of the persons to whom the slander was uttered, to order a bill of particulars of the place where, the time when, and the names of the persons to whom the slander was uttered,[2] But where in slander the words were alleged to have been spoken "in the presence and hearing of divers persons," held, defendant was not entitled to an order for particulars of the names of all persons in whose presence or hearing the alleged slander was uttered, but merely to an order stating the name of some one person in whose presence plaintiff claimed the slander was uttered[3]—and where the slander was alleged to have been uttered in a public room, an order was made that plaintiff deliver "the best particulars he can give of the persons present" when the slander was uttered.[4]

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[1] Gouraud *v.* Fitzgerald, 37 Week. Rep. 55.

[2] Steibeling *v.* Lockhaus, 21 Hun, 457; Gardener *v.* Knox, 27 *Id.* 500; Complaint charged that one T. at defendant's request uttered certain slander of plaintiff; held, defendant was entitled to a bill of particulars. (Bradbury *v.* Cooper, 53 L. J. R. Q. B. N. S. 558; 12 Q. B. D. 94.)

[3] Dempewolf *v.* Hills, 53 N. Y. Super. Co't, 105; 11 N. Y. Civ. Pro. Rep. 141; 23 Week. Dig. 450; Wingard *v.* Cox, Week. Notes, 1874, p. 106. Plaintiff was refused an order for particulars of the names of persons mentioned in the statement of claim who were passing in the street when, as alleged, the slander was uttered.

[4] Williams *v.* Ramsdale, 36 Week. Rep. 125, an order was made for a statement of the occasions upon which the words were published. (Slater *v.* Slater, 8 L. T. N. S. 856, and see Wicks *v.* McNamara, 27 L. J. 419 Ex.; 3 Hurl. & N. 568; Early *v.* Smith, 12 Ir. Com. Law Rep. xxxv appendix; cited and approved Tilton *v.* Beecher, 59 N. Y. 187.) In Roth *v.* Coursen, City Court, New York, May 6, 1885, the action was to recover damages for slanderous words uttered by the defendant "in the presence of divers good and worthy citizens." The plaintiff was ordered to furnish a bill of particulars specifying the times when, places where, and the names of the persons in whose presence the words were used. A bill was accordingly served, stating time when and place where the words were uttered in the presence of two persons whose names were given, "and several other people whose names are at present unknown to the plaintiff." The defendant then moved for a bill of further particulars, giving the names of the "unknown persons," or for an order striking out from the particulars theretofore served the statement that the words were uttered in the presence of persons whose names were unknown. *Per* McAdam, Ch. J. This is asking too much. Where slanderous words are uttered in the presence of a multitude of people, and the plaintiff gives all the names he is able to obtain, there is no reason why

In an action for libel by plaintiff, as director of a company against defendants, a committee of shareholders, for statements contained in a report drawn up and alleged to be maliciously published by them, defendants, after issue, obtained an order for particulars of the occasion of any publication by them to persons other than the stockholders; held, that defendants were not entitled to such particulars, since the publication complained of clearly included publication to others than shareholders, though not expressly so stated, and sufficiently complied with the requirements of the pleading rules.[1] Where the complaint alleges special damage to plaintiff's business by loss of customers, there plaintiff may be ordered to give particulars showing sales and profits with names and addresses of the persons whose custom has been lost, and dates and amounts of any transaction the benefit of which plaintiff has lost, and such particulars will be ordered although the complaint may show a cause of action, independently of the special damage.[2] But particulars will not be ordered of injury to plaintiff's reputation in general.[3] The court refused to

his inability to name the others should be made the basis for precluding him from proving that others were present at the time, as this circumstance may have an important bearing on the question of damages. The rule in regard to bills of particulars should be reasonably construed with the design of furthering and not defeating justice. The bill already furnished substantially satisfies all the requirements of good practice. Motion for further bill denied; no costs. (60 How. Pr. R. 277.)

The bill of particulars must specify the precise locality at which the alleged statements were made. (Alden *v.* Monell, Barrett, J., October, 1883; Goldsmith *v.* Glatz, 27 Week. Dig. 453.) It need not state the time. (McCarran *v.* Sire, 3 N. Y. Supp. 659.)

[1] Gouraud *v.* Fitzgerald, 37 Week. Rep. 55); distinguishing Roselle *v.* Buchanan, 16 Q. B. D, 656.

[2] Am. Multiple Fabric Co. *v.* Eureka Fire Hose Co. 18 Abb. N. C. 70; Goldsmith *v.* Glatz, 27 Week. Dig. 453.

[3] *Id.* These averments, as was said in Lane *v.* Williams (37 Hun, 389), may be sustained by proof of the malicious act without proof of specific instances. But the averment that the plaintiff has lost many sales and profits which it would have made in its business, but for the defendant's acts—to wit, $5,000 or thereabouts—stands upon a different footing. That is an averment of special damage, which the plaintiff need not have made, but having chose to make it must particularize. The affidavit of the attorney that the plaintiff cannot give the particulars because the agent has them is of no force. The plaintiff acts through agents and can control them; besides, the plaintiff's officers should have told us that they could not control the agents and why not

give a bill of particulars of matter plead in mitigation.[1] A party cannot be ordered to give the names of the persons he intends to call as witnesses, nor to discover the evidence he proposes to adduce.[2]

In an action for libel the court may in its discretion grant an order for the examination of a party in order to enable the other party to furnish a bill of particulars which he has been required to furnish. Thus, where defendant pleaded matter in justification and in mitigation, plaintiff obtained an order that defendant furnish a bill of particulars [of the justification and mitigation], whereupon defendant obtained an order to examine plaintiff as a witness. Then plaintiff moved for an order to stay defendant from examining plaintiff until after service of bill of particulars, the motion was denied on the ground that defendant might need such examination to enable him to prepare his bill of particulars. On appeal to General Term the order denying the motion was affirmed.[3]

In Massachusetts and in Maine, by statutes, a bill of particulars of the language which the plaintiff intends to prove may be ordered.[4] These are cases where the precise words alleged to have been published were not set forth in the complaint (§ 329).

Where the complaint alleges special damage, and the special damages alleged is such as are required to be alleged to entitle plaintiff to prove them, a bill of particulars of such special damages will be ordered. Thus: where the declaration alleged as special damage, which was essential to the maintenance of the action, that certain persons had, in consequence of the alleged slander, refused her pecuniary assistance or their votes for her admission into a benevo-

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the attorney? Motion, in the particular mentioned, granted.

[1] Holmes *v.* Jones, 13 N. Y. Civ. Pro. Rep. 260; 20 N. Y. St. Rep. 176.

[2] Eade *v.* Jacobs, 3 Ex. D. 337; Dempewolf *v.* Hills, 53 N. Y. Superior Court Rep. 105.

[3] Ball *v.* Even. Post Pub. Co. 48 Hun, 149; 15 N. Y. St. Rep. 492.

[4] Clark *v.* Munsell, 6 Metc. 373; True *v.* Plumley, 36 Maine, 466.

lent institution, an application by the defendant for particulars of the names of the persons to whom the publication was made was denied, but interrogatories were allowed as to the names of the parties whose patronage plaintiff alleged she had lost.[1] In an action for libel by a charitable corporation, the complaint alleged, among other things, that by reason of the publication, persons who would otherwise have done so, had ceased or refused to contribute or make donations to it. Plaintiff was compelled to furnish a bill of particulars, stating the names of such persons.[2] Where the complaint stated in substance that plaintiff was a physician practicing in the city of New York, and that defendant published in its newspaper the following libel: "W. H. denounced McF. (meaning plaintiff) to his face in the car as a lying scoundrel, unworthy of credence, who had been guilty of immoral practices," and that by means of such publication plaintiff was injured in his good name and credit as a physician, and in his practice as such to his damage $15.000. The defendant demanded a bill of particulars of the items aggregating the $15,000 damages, with a specification of the times, circumstances and manner in which the alleged damage to plaintiff's practice as a physician was caused, and the names of the individual patients or positions of profit, if any, the loss of which compose the said amount of §15,000. The motion was denied, and *per curiam* Daly, J.: If plaintiff had alleged loss of patients or positions of profit by reason of the libel, that would have been an averment of special damage which he would be compelled to prove upon the trial, and which his adversary might, therefore, compel him to particularize. But plaint-

[1] Wood *v.* Jones, 1 Fost. & F. 301. Since the decision of that case the rule as to allowing bills of particulars has been extended, and to-day in such a case particulars would be ordered.

[2] New York Infant Asylum *v.* Roosevelt, 35 Hun, 501.

iff need not give the particulars of the injury to his good name and reputation and in his business and credit. The plaintiff, a physician, is charged with immoral practices. This tends directly to injure him in his profession and he may recover, under a general allegation of damage, without specific proof of damages.[1]

It has been held that the court will not order a bill of particulars of a justification. The practice has been in such a case to move to make the answer more definite.[2] But a bill of particulars as to the defense will, in certain cases, be ordered.[3] Defendant published articles alleging that plaintiff, the Governor of Mauritius, had been charged by members of the Council with sending to the Colonial Office garbled reports of their speeches. The articles were also alleged by plaintiff to impute that he had in fact transmitted such garbled accounts. An action for libel having been brought, defendant pleaded that the alleged libels were true in substance and in fact; held, it was not clear whether the defense meant, that what was charged against plaintiff had been truly reported, or that what was reported to have been charged was in fact true, and that plaintiff was entitled to have the meaning of the answer made definite.[4]

Bills of particulars of matters peculiarly within knowledge of defendant, will not be ordered. As in an action for slander of title to personal property plaintiff can recover only such damages as are specifically alleged, in such an action, a bill of particulars of loss of customers and of sales was refused.[5]

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[1] McFarland *v.* Even, Post Pub. Co. MS. and see Steibeling *v.* Lockhaus, 21 Hun, 457.

[2] Orvis *v.* Dana, 1 Abb. N. C. 268; 6 Daly, 434.

[3] Wren *v.* Weld, Law Rep. 4 Q. B. 213; Jones *v.* Bewicke, Law Rep. 5 C. P. 32; Gourley *v.* Plimsoll, 8 *Id.* 362.

[4] Hennesey *v.* Wright, 57 L. J. Q. B. 594; 36 Week. Rep. 878.

[5] Childs *v.* Tuttle, 15 N. Y. Civ. Pro. Rep. 184; 17 N. Y. St. Rep. 943; 48 Hun, 229. Where the charge was that defendants had sent circulars to "other" agents of plaintiff; held, defendant was entitled to bill of particulars of the names and place of resi-

§ 274. If the defendant does not answer, he admits the allegations of the complaint but not the innuendoes.[1] The plaintiff must issue a writ of inquiry, and have his damages assessed by a sheriff's jury, not by a referee.[2] The court may order the writ of inquiry to be executed before a judge.[3] On the execution of the writ, the plaintiff is not required to give any evidence of publication,[4] and without offering any proof is entitled to at least nominal damages.[5] Plaintiff is not confined to nominal damages.[6] The defendant, on the execution of the writ, will not be allowed to read parts of the publication not set forth in the complaint, in order to give a meaning to the words set forth in the complaint different from that alleged by the plaintiff;[7] and semble, the defendant will not be allowed to give evidence of the truth of the language complained of.[8] But defendant may give evidence in mitigation.[9] Ordinarily an

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dence of each agent to whom it was intended to prove defendant had sent circulars. (*Id.;* citing Steibeling *v.* Lockhaus, 21 Hun, 457; Gardiner *v.* Knox, 27 *Id.* 500; Daniel *v.* Daniel, 2 N. Y. Civ. Pro. Rep. 238; Hat Sweat Comp. *v.* Reinoehl, 40 Hun, 47.

[1] Code of Civ. Pro. §§ 522, 1212; § 362, *post;* but see Tillotson *v.* Cheetham, 3 Johns. 56. After judgment by default, it is too late to object to the *venue*. (Wickham *v.* Baker, 4 Blackf. 517.)

[2] Voorhies' Code, p. 359, 10th ed.; and see Schewer *v.* Klein, 1 C. & P. 477.

[3] Casneau *v.* Bryant, 6 Duer, 668; and see Dillaye *v.* Hart, 8 Abb. Pr. Rep. 394; Hays *v.* Berryman, 6 Bosw. 679: Mankleton *v.* Lilly, 3 N. Y. St. Rep. 423.

[4] Tripp *v.* Thomas, 3 B. & Cr. 427; 5 D. & R. 276; 1 Carr. 477. In this case it was also held, that although the plaintiff gives no evidence, the jury are not limited to give nominal damage. (See, also, Manktetow *v.* Lilly, 25 Week. Dig. 354.) It has been held that after assessment of damages on a writ of inquiry, the plaintiff cannot, without leave of the court, enter a *nolle prosequi* as to one count, and take judgments for the others. (Backus *v.* Richardson, 5 Johns. 476.)

[5] Bates *v.* Loomis, 5 Wend. 134; Mankleton *v.* Lilly, 3 N. Y. St. Rep. 422.

[6] Cottrell *v.* Jones, 11 C. B. 713; Tripp *v.* Thomas, 3 B. & C. 427.

[7] Tillotson *v.* Cheetham, 3 Johns. 56.

[8] Lewis *v.* Few, Anthon, 102. Held not sufficient ground for staying a writ of inquiry that the House of Commons had voted the publication privileged. (Stockdale *v.* Hansard, 8 Dowl. 148.) In Beatson *v.* Skene (5 Hurl. & N. 839), an order was made permitting the defendant to inspect and take copies by photograph or otherwise, of the alleged libels. The cost of taking copies, in such a case, is to be borne by the party requiring them, but the costs of an order for inspection are in general costs in the cause. (Davey *v.* Pemberton, 11 C. B. N. S. 629.)

[9] N. Y. Code Civ. Pro. § 536; Holmes *v.* Jones, 13 N. Y. Civ. Pro.

inquest will not be set aside because the damages are excessive or insufficient, but inquest may be set aside for admission, against objection of improper evidence.[1]

§ 274*a*. In Macaulay *v.* Shackell,[2] Lord Eldon, on a bill in chancery, granted a commission for an examination of witnesses abroad for the purpose of proving a plea justifying the truth of an alleged libel, with an injunction till the return of the commission. It was considered an extraordinary stretch of his authority, but subsequently the common-law courts have adopted the practice, where the facts warrant it, of issuing a commission with a stay of proceedings. We remember one case, against the proprietor of the London Times newspaper, where the court stayed the proceedings for eighteen months, and gave the defendant an open commission to take the depositions of all or any persons in any part of the world.[3]

§ 274*b*. Where in an action for libel or slander a cause

Rep. 260-263; DeGaillon *v.* S'Aigle, 1 Bos. & Pul. 368; Gilbert *v.* Rounds, 14 How. Pr. R. 47; Mankleton *v.* Lilly, 3 N. Y. St. Rep. 422.

[1] Ward *v.* Haight, 3 Johns. Cas. 80; Mankleton *v.* Lilly, 3 N. Y. St. Rep. 422.

[2] 1 Bligh, N. S. 96. That case was affirmed on appeal in the House of Lords, when the chancellor said he had received an anonymous letter "assuring him that all the men of eminence at the bar thought this decision wrong, and that it is produced by the affection which the chancellor is supposed to have had for *some* Mr. Shackell." (See Campbell's Life of the Chancellors, X, ch. 213, p. 246.) In Brown *v.* Murray, 4 D. & R. 830, the court put off a trial to enable defendant to procure the attendance of witnesses from a foreign country to prove a justification, but imposed the terms that upon the trial the defendant should admit the publication of the alleged libel.

[3] Bogle *v.* Lawson. This case was tried August, 1841. Verdict for plaintiff, damages one farthing, and the judge refused to certify for costs. The Times Testimonial arose out of this case. Defendants published in their newspaper that all advertising doctors were imposters and the "Golden Remedies" were "nonsensical quackery." Plaintiff, who claimed to be the proprietor of Golden Remedies, sued for this publication. Defendants justified and obtained an order to examine plaintiff. On examination he was asked to disclose the ingredients of Golden Remedies. This he refused to do, and for his refusal a judge at Chambers dismissed his complaint with costs. On appeal the General Term affirmed said order. (Richards *v.* Judd, 15 Abb. Pr. R. N. S. 184.) Of course in action for libel plaintiff cannot be examined as to any matter that might subject him to criminal prosecution. (Kinney *v.* Roberts, 26 Hun, 166. See § 379, *post*.)

is compromised by the defendant agreeing to apologize and pay plaintiff's costs, as between attorney and client, the court will by rule enforce performance of the agreement,[1] unless defendant shows that he is unable to perform the stipulation on his part.[2]

§ 275. The trial of the issues in an action for slander or libel must be by jury, unless a jury trial is waived, or the parties, by consent, try the issue before the court without a jury, or before a referee, or submit to an arbitration.[3] In case of a trial by jury, the court may order a struck jury, but will not do so in trials to be had in the city of New York.[4] The court may refuse to try the cause if the trial will involve an attack upon the chastity of a third person not a party to the action.[5] In case of a new trial, the retrial may be before the judge who presided on the first trial.[6]

§ 276. It is supposed that in actions for slander or libel, the plaintiff has, in every case, the right to begin.[7] In

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[1] Riley *v.* Byrne, 2 B. & Ad. 779; Tardrew *v.* Brook, 5 B. & Ad. 880.

[2] Clare *v.* Blakesley, 8 Dowl. 835.

[3] Code of Pro. § 253. Instances of actions for slander and libel being referred. (Bonner *v.* McPhail, 31 Barb. 106; Rockwell *v.* Brown, 36 N. Y. 207; Perkins *v.* Mitchell, 31 Barb. 461; Sanford *v.* Bennett, 24 N. Y. 20.) Arbitration. (See Grosvenor *v.* Hunt, 11 How. Pr. Rep. 255; Grayson *v.* Meredith, 17 Ind. 357; Shephard *v.* Watrous, 3 Cai. 166.) An award about calling a butcher a bankrupt, was referred to a trial at law, because of the excessiveness of the damages given on the award. (Cooper *v.* The Butcher of Croyden, 3 Ch. R. 76.) In 2 Vern R. 251, it is said there was another reason besides the excessive damages for setting aside the award. That reason was the relationship of the arbitrator to one of the parties. See an award that defendant should make submission and acknowledge himself sorry for all trespasses and *words*. (Cartwright *v.* Gilbert, 2 Brownl. 48.) As to amount of costs, where an action of slander was referred, and plaintiff recovered less than forty shillings damages. (Frean *v.* Sergent, 8 Law Times Rep. 467.)

[4] Genet *v.* Mitchell, 4 Johns. 186; Thomas *v.* Rumsey, 4 Johns. 482; Thomas *v.* Croswell, 4 Johns. 491; Nesmith *v.* Atlantic Mut. Ins. Co. 8 Abb. Pr. Rep. 423.

[5] Loughead *v.* Bartholomew, Wright, 90. As to right of judge to refuse to try a cause, see DeCosta *v.* Jones, Cowp. 729; Squires *v.* Whisken, 3 Camp. 140; Ditchburn *v.* Goldsmith, 4 Camp. 152; Brown *v.* Leeson, 2 H. Black. 43; Egerton *v.* Furzeman, 1 C. & P. 613; Henkin *v.* Gerse, 2 Camp. 408.

[6] Fry *v.* Bennett, 3 Bosw. 200; 28 N. Y. 329. And so in Kansas. (Stith *v.* Fallenwieder, 19 Pac. Rep. 314.)

[7] Littlejohn *v.* Greeley, 13 Abb. Pr. Rep. 41; see Wood *v.* Pringle, 1 Mo. & Rob. 277; Sawyer *v.* Hopkins, 9 Shep. 268; Huntington *v.* Conkey, 33

New York the right to begin is so far within the discretion of the court, that an erroneous ruling in respect to it is not a ground for a new trial nor for a reversal of the judgment on appeal.[1] In England it has been held that an erroneous ruling as to the right to begin is ground for a new trial.[2] And so in Alabama.[3]

§ 277. Counsel should not state facts which they are not prepared to prove; but a disregard of this rule will not entitle the opposite party to disprove a statement of counsel.[4] Nor is a party limited in his proof to the opening of his counsel.[5] Counsel, in summing up, should confine themselves to the facts proved; but a disregard of this rule is not a ground for a new trial.[6] The summing up of counsel may, it seems, affect the damages. Thus, in an action for libel brought by an attorney, the defendant's counsel having ridiculed the profession, and assailed the character of the plaintiff, Lord Chief Justice Cockburn told the jury that if they thought it was a libel, and directed against the plaintiff, "a defense of that description is ten-fold, if not an hundred-fold, an aggravation of any libel which can be brought against a man for any departure from the propriety of his profession, . . . a most grievous ag-

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Barb. 218; Ayrault *v.* Chamberlain, 33 Barb. 233; Fountain *v.* West, 23 Iowa, 9; Lexington Ins. Co. *v.* Payer, 16 Ohio, 324; Carter *v.* Jones, 6 C. & P. 64; 1 M. & Rob. 281; Mercer *v.* Whall, 5 Q. B. 462; Hoare *v.* Dickson, 7 C. B. 164. Where there is a plea of justification only, defendant is to open and close. (Ransone *v.* Christian, 56 Ga. 351.) Where the only defense is justification or mitigation the burthen of proof rests on defendant, and he is entitled to open and close. (Heilman *v.* Shanklin, 60 Ind. 424; Stith *v.* Fullenwieder, 19 Pac. [Kans.] 314; McCoy *v.* McCoy, 106 Ind. 492.)

[1] Fry *v.* Bennett, 3 Bosw. 200; 28 N. Y. 329.

[2] Ashley *v.* Bates, 15 M. & W. 589; Booth *v.* Millns, 15 M. & W. 669; 4 D. & L. 52; 15 Law Jour. Ex. 354; Doe *v.* Brayne, 17 Law Jour. C. P. 127; 5 C. B. 655; Huckman *v.* Fernie, 3 M. & W. 505; but see Brandford *v.* Freeman, 5 Ex. 734; Burrell *v.* Nicholson, 1 M. & Rob. 304; Bird *v.* Higginson, 2 A. & E. 160.

[3] Chamberlain *v.* Gaillard, 26 Ala. 504.

[4] Duncombe *v.* Daniell, 8 C. & P. 223.

[5] Nearing *v.* Bell, 5 Hill, 291.

[6] Fry *v.* Bennett, 3 Bosw. 202; 28 N. Y. 331; Saunders *v.* Baxter, 6 Heisk. (Tenn.) 370, but see Hitchcock *v.* Moore, 37 No. West. Rep. 914; 37 Alb. L. J. 446.

gravation, and one which it is your bounden duty to take into your serious consideration."[1]

§ 278. Where the publication is denied, the libel should not be read to the jury until after the plaintiff's counsel has called witnesses to prove the publication; but a disregard of this rule is not a ground for a new trial.[2] As a general rule, the defendant is entitled to have read on the trial, as a part of the plaintiff's case, the whole publication containing the alleged libelous matter,[3] or to have in evidence the whole conversation in which the alleged defamatory words were spoken, for he is entitled to show by the context that the alleged defamatory language was not used in a defamatory sense (§ 283). Where a letter of the defendant's was read, which referred to an

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[1] Note to Gfroerer *v.* Hoffman, 15 Up. Can. Q. B. Rep. 445. Damages may be increased by what passes in court. (Darby *v.* Ouseley, 25 Law. Jour. Ex. 227; 1 H. & N. 1.) Aggravating damages by cross-examining the plaintiff as to the truth of the charge against him, and failing to establish the truth of the charge. (Risk Allah Bey *v.* Whitehurst, 18 Law Times Rep. 615.) And where, on the trial of an action for slander, the plaintiff expressed his willingness to accept an apology and nominal damages, if the defendant would withdraw his plea of justification, the defendant refused this offer, and offered no evidence in support of his plea; the jury were directed to consider the nature of the imputation, how it had been made and persisted in down to the time of the verdict, and this direction was upheld. (Simpson *v.* Robinson, 12 Q. B. 513.) Motion for new trial on ground of improper judicial interference with counsel, in not allowing him to read to the jury from certain books. (Darby *v.* Ouseley, 1 H. & N. 1.)

[2] Taylor *v.* State of Georgia, 4 Ga. 14.

[3] Thornton *v.* Stephen, 2 M. & Rob. 45; Cooke *v.* Hughes, Ry. & M. 112; 2 Greenl. Ev. § 423; Rex *v.* Lambert, 2 Camp. 398; Rutherford *v.* Evans, 6 Bing. 451; 4 C. & P. 74. Papers referred to in a libel may be read in evidence in explanation, to give a construction to it. (Nash *v.* Benedict, 25 Wend. 645.) But the defendant cannot avail himself of previous publications to explain the libelous matter or mitigate the damages, unless he shows the plaintiff to be the author of such previous publications. (Haws *v.* Stanford, 4 Sneed [Tenn.] 520.) The whole libel must be considered in determining whether it applies to the plaintiff. (Cook *v.* Tribune Asso. 5 Blatch. C. C. 352.) In the case of the essays and reviews (Wilson *v.* Bishop of Salisbury, 9 Law Times, N. S. 790), the Privy Council held that whilst "it is competent to the accused party to explain from the rest of his work the sense or meaning of any passage or word that is challenged by the accuser, the accuser is, for the purpose of the charge, confined to the passages which are included and set out in the articles as the matter of the accusation." (London Quarterly Review, April, 1864, Am. reprint, p. 284, attacks this rule as novel and erroneous.)

account of the transaction in a newspaper, it was held that the newspaper was evidence;[1] and where the alleged libels were contained in certain newspapers, the plaintiff proposed to put in evidence and have read the alleged libelous articles only. For the defendant, it was claimed that he was entitled to have the whole of the newspapers put in evidence, *as part of the plaintiff's case*, and to enable the defendant to call attention to certain matter published in the same papers with the said articles, and to which they referred. Cockburn, Ch. J., after consulting Blackburn, J., allowed the defendant's claim.[2] But where a paragraph in a subsequent number of a newspaper is given in evidence by the plaintiff, to prove malice, the defendant is not entitled to have read out of the same newspaper, as part of the plaintiff's case, other paragraphs having no reference to the one read by the plaintiff.[3]

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[1] Weaver *v.* Lloyd, 1 Car. & P. 296.

[2] Hedley *v.* Barlow, 4 Fost. & F. 224.

[3] Darby *v.* Ouseley, 1 Hurl. & N. 1; see *ante*, notes to §§ 137, 138; Bolton *v.* O'Brien, 16 Law Rep. Ireland, 97, 483. No reported case has been found in which the plaintiff has insisted upon the right to read the entire article. In Goodrich *v.* Davis, 52 Mass. 473, the whole of the article was read without objection, and therefore held proper to be considered. It has been supposed that the general rule is to be followed, if one party gives evidence of a part of a document the other party is entitled to have the whole document read. (Greenl. Ev. § 463; The Queen's Case, 2 Brod. & B. 289, 290.) Words not set out in the complaint, although proved, cannot be submitted to the jury. (Lynde *v.* Johnson, 39 Hun, 12.) The rule in libel suits was, and is, that while plaintiff cannot give in evidence more than the words of which he had set out in his complaint; defendant has the privilege of reading the residue of the article, and indeed of insisting upon its being read as part of plaintiff's case.

In England, in actions for libel, plaintiff is always allowed to begin; if defendant gives no evidence, he closes the case, plaintiff has no reply. It is therefore important there, where defendant desires the residue of the libel read to have it read as part of plaintiff's case.

It was claimed by counsel (Ld. Abinger) that so much of the article containing an alleged libel as is not counted upon is admitted by plaintiff to be true. (Cooke *v.* Hughes, 1 Ry. & M. 112.) This seems to be the only authority for such a proposition, but it appears reasonable, for if the residue of a publication might be construed as *false*, it might be the subject of another action, and there would be a violation of the rule that plaintiff should never be permitted to give in evidence words which might be the subject of another action. (Rapallo, J., Frazier *v.* McCloskey, 60 N. Y. 338.)

§ 279. Where the defenses are a general denial and justification, the plaintiff may, before resting his case, either give all his evidence to defeat the justification,[1] or content himself by proving the allegations of his complaint only, in which case he will be restricted in his reply to such evidence only as goes exactly to answer the facts proved by the defense.[2] The evidence is usually closed with the plaintiff's rebutting testimony.[3] It is discretionary with the court to allow additional testimony on the part of either party after he has once closed;[4] and where there is a plea of justification, the plaintiff may, before resting his case, give evidence of express malice.[5] (§§ 388, 390, 392.)

§ 280. The plaintiff may, on the trial, abandon one or more of the causes of action he has alleged in his complaint,[6] or where the alleged defamatory matter is divisible, may withdraw a portion of the matter set forth in the complaint.[7] A defendant is not always allowed to withdraw a plea of justification,[8] but a refusal to allow such a withdrawal was in one case held error.[9] Where the defendant had pleaded the general issue and a plea of apology, leave to withdraw the plea of apology was denied, the

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[1] Browne *v.* Murray, Ry. & Mo. 254; Ayrault *v.* Chamberlain, 33 Barb. 234; York *v.* Pease, 2 Gray, 282.

[2] Pierpoint *v.* Shapland, 1 Carr. & P. 448.

[3] Teagle *v.* Deboy, 8 Blackf. 134.

[4] Wilborn *v.* Odell, 29 Ill. 456.

[5] Fry *v.* Bennett, 3 Bosw. 202; but see Winter *v.* Donovan, 8 Gill, 370.

[6] Kirkaldie *v.* Paige, 17 Vt. 256; Stow *v.* Converse, 4 Conn. 17; Gould *v.* Weed, 12 Wend. 12; but see *post*, § 372.

[7] Hesler *v.* Degant, 3 Ind. 501; Genet *v.* Mitchell, 7 Johns. 120.

[8] In New York the plea of justification could not be withdrawn without an admission of its falsity. (Clinton *v.* Mitchell, 3 Johns. 144; Lent *v.* Butler, 3 Cow. 370; Root *v.* King, 7 Cow. 613.) It cannot be withdrawn after it has been read to the jury. (Lea *v.* Robertson, 1 Stew. 138.) Where the defendant, during a trial, withdrew a plea of justification, held that the plea could not be considered by the jury in aggravation. (Shirley *v.* Keathey, 4 Cold. [Tenn.] 29.)

[9] Fitzgerrel *v.* Ferguson, 25 Ill. 138. In Pennsylvania the withdrawal of the plea is within the discretion of the court. (Rush *v.* Cavenaugh, 2 Barr. 187.)

plaintiff swearing he would be prejudiced.[1] It was held that a written statement made by the defendant, in which he disclaimed any evil intentions toward plaintiff, could not be given in evidence on the trial, and if allowed by the plaintiff to be given in evidence, could not be sent out with the jury.[2] Where the plaintiff, on the trial, abandons a part of the defamatory matter, the part abandoned may be referred to by defendant to show the meaning of the part retained.[3]

§ 281. The jury are to determine, as a question of fact, the customary meaning of a word,[4] and the meaning of a doubtful word,[5] and whether the language was or was not ironical.[6] Whether or not the language applies to the plaintiff (§ 375*a*), and when the language is alleged to affect one in his occupation whether the language did so affect him.[7] If the alleged defamatory matter is unambiguous, the court is to determine whether or not it is actionable.[8]

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[1] Sullivan *v.* Lenihen, 7 Irish Law Rep. 463.

[2] Hamilton *v.* Glenn, 1 Penn. St. Rep. 340.

[3] Genet *v.* Mitchell, 7 Johns. 120; Peters *v.* Ulmer, 1 N. Y. Weekly Dig. 455.

[4] Law *v.* Cross, 1 Black U. S. Rep. 533. See Edsall *v.* Brooks, 3 Robertson, 284 (blackmail); Wachter *v.* Quenzer, 29 N. Y. 547 (blackcross); and see Blakeman *v.* Blakeman, 18 No. West. Rep. 103. It is for the court to construe words in the English language (Barnett *v.* Allen, 36 Law Jour. 412, Ex.); and per Bramwell, J.: "Either the word (blackleg) is a known word in the language, in which case we must construe it, or it is a cant slang phrase, the meaning of which is a matter of fact. (*Id.*; and see *ante*, note 1, p. 120, and *post*, § 286.) Where the words are capable of only one meaning, their construction is a question for the court, but where they are capable of two meanings, or are of doubtful signification, it is the province of the jury to decide in what sense they were used. (Calkins *v.* Wheaton, 1 Edmonds' Rep. 229, citing Goodrich *v.* Woolcott, 3 Cow. 231; 5 Cow. 714 [been with a sow].)

[5] Hays *v.* Brierly, 4 Watts, 392; McLaughlin *v.* Bascom, 38 Iowa, 660; Moore *v.* Butler, 48 N. H. 161; Brayne *v.* Cooper, 5 M. & W. 249 (trade maintained by prostitution, &c.); Homer *v.* Taunton, 5 Hurl. & Nor. 661 (truckmaster).

[6] Reg. *v.* Brown, Holt, 425; 11 Mod. 86; Andrews *v.* Woodmansee, 15 Wend. 232; Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. Pr. Cas. 210. Where the court charged the jury that if the words were spoken "jocularly," the defendant was entitled to a verdict, and the jury having found for the defendant, the court granted a new trial without costs, and on plaintiff stipulating to abandon the action. (Donoghue *v.* Hayes, Hayes' Ir. Ex. Rep. 265; but see Comw. *v.* Morgan, 107 Mass. 199.)

[7] Ramesdale *v.* Greenacre, 1 Fost. & Fin. 61, and *ante*, note to § 248.

[8] Pittock *v.* O'Niell, 63 Penn. St.

"If the written instrument *can* be a libel, then it is for the jury to say whether it is a libel; but there remains a preliminary question which it is for the court or a judge to decide, namely, whether the writing can be a libel, whether in truth there is any evidence upon which a jury can say it is a libel, and that question is still open, and is a question for the court."[1] If the judge and jury think the publication libelous, still if on the record it appears not to be so, judgment must be arrested.[2] "Where words are capable of two constructions, in what sense they were meant is a question of fact to be decided by the jury."[3] Thus, if in

253; Calkins *v.* Wheaton, 1 Edmonds Rep. 229; Hunt *v.* Goodlake, 29 L. T. N. S. 473; see § 287, *post*. In Michigan it is said the English doctrine that the question of libel or no libel is for the jury is not accepted, and that if the publication is plainly libelous, it is the duty of the court to so declare, and instruct the jury accordingly. (Boureseau *v.* Detroit Ev. Jour. 30 No. West Rep. 376.)

[1] Brett, J., Reg. *v.* Bradlaugh, 3 Q. B. D. 607.

[2] Denman, Ch. J., Bayliss *v.* Lawrence, 11 A. & E. 920, and quoted by Earle, C. J. Fray *v.* Fray, 17 C. B. (N. S.) 603.

[3] 1 Stark. Slan. 60; Van Vechten *v.* Hopkins, 5 Johns. 221; Dexter *v.* Taler, 12 *Id.* 240; M'Kinley *v.* Rob, 20 *id.* 356; Gorham *v.* Ives, 2 Wend. 534 Gibson *v.* Williams, 4 Wend. 320; Blaisdell *v.* Raymond, 14 How. Pr. Rep. 265; Bennett *v.* Williamson, 4 Saidf. 60; Middleton *v.* Walter, 1 N. Y Weekly Dig. 407; 67 N. Y. 584; Vaus *v.* Middlebrook, 3 N. Y. St. R. 277; Schoonhoven *v.* Beach, 23 Week. Dig. 48; Hays *v.* Ball, 72 N. Y. 418; Womiley *v.* Monroe, 136 Mass. 464; Wooding *v.* Knickerbocker, 31 Minn. 268; Ilsworth *v.* Hays, 37 No. West. Rep. 29; Homer *v.* Taunton, 5 Hurl. & Nor 661. Where the words impute that the plaintiff, a reputed married woman, is the wife of another man, itis for the jury to say whether the defendant does or does not mean she hasbeen guilty of bigamy. (Heming *v.* Power, 10 M. & W. 564.) Where the words were, I have got a warrant for Tempest (the plaintiff); I will advertise a reward to apprehend him, and shall transport him for felony, Lord Ellenborough left it to the jury to say whether defendant spoke with reference to the warrant which had been improvidently issued, or meant to impute a charge of felony. (Tempest *v.* Chambers, 1 Stark. Cas. 67.) Where the words were, A. & B. have closed their accounts with you, and are going to shut you up—innuendo that plaintiff was insolvent, or likely to be so—left to the jury to say if such was the meaning. (Gostling *v.* Brooks, 2 Fost. & Fin. 76.) Although the meaning imputed by the innuendo is not actionable, still the meaning of the publication is for the jury. (Wissing *v.* Coombs, 4 Vict. Law Rep. L. 70.) The facts that other papers have published the alleged libel, and that similar reports have been circulated in regard to plaintiff, do not deprive him of the right to have the question of meaning submitted to the jury. (Bergman *v.* Jones, 94 N. Y. 51.) Where an article ridiculing a person for ostentation was published in a newspaper as the result of mutual banter, between the publisher and the person described, with the knowledge and consent of the latter, the question of libel is for the jury. (Sullings *v.* Shakespeare, 46 Mich. 408.) The question of malice, and the sense in which the words were understood are

one sense the language imputes a crime, and in the other sense does not, the jury are to say in which sense the language is to be understood.[1] And where A. said to B., "You have killed one negro and nearly killed another," held that the jury were to say whether the words were used in a defamatory sense or not;[2] so where the language was, "You are a thief. You stole hoop-poles and saw-logs from D. and M.'s land," held that it was properly left to the jury to decide if the charge was taking timber or hoop-poles already cut—which was a felony—or with cutting down and carrying away timber to make hoop-poles, which was a trespass.[3] Where words apparently charging a crime are published, it is proper to instruct the jury that the words are actionable if uttered with intent to charge the crime,[4]

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questions for the jury, yet where the evidence shows an absence of malice, the jury are not authorized in finding defendant guilty. (Foval *v.* Hallett, 10 Bradw. [Ill.] 265.)

[1] Cregier *v.* Bunton, 2 Rich. 395; 11 Humph. 507; *Ex parte* Bailey, 2 Cow. 479; and see 1 Amer. Lead. Cas. 153; Davis *v.* Johnson, 2 Bailey, 579; Welsh *v.* Eakle, 7 J. J. Marsh. 424; Lucas *v.* Nichols, 7 Jones' Law (N. Car.) 32; Snyder *v.* Andrews, 6 Barb. 47; Thompson *v.* Grimes, 5 Ind. (Porter), 385; Smith *v.* Miles, 15 Vt. 245; Usher *v.* Severance, 20 Maine, 9; Turrill *v.* Dolloway, 26 Wend. 383; Jones *v.* Rivers, 3 Brevard, 95; Pittsburg A. & M. R. Co. *v.* McCurdy, 8 Atl. Rep. 230.

[2] Hays *v.* Hays, 1 Humph. 402; Chalmers *v.* Payne, 2 C. M. & R. 156.

[3] Dexter *v.* Taber, 12 Johns. 239; and Stockdale *v.* Tarte, 4 Adol. & El, 1016; Tuson *v.* Evans, 4 Per. & D. 396.

[4] St. Martin *v.* Desnoyer, 1 Minn. 156; see *ante*, § 139. The general rule doubtless is, that the ordinary popular meaning or sense of the language alleged to be libelous is to be taken to be the meaning of the publisher; but a foundation may be laid for showing another or a different meaning, and so where the language is of doubtful meaning or import, or where it fails to convey any explicit meaning without the aid of extrinsic circumstances. In such cases something may have previously passed, or some habit or usage may have obtained, that gave peculiar meaning or significance to the expressions employed. When, therefore, it is desired to get at this peculiar or extraordinary meaning of what is alleged to be libelous, the witness should be first asked whether there be any extraordinary or peculiar meaning expressed by the words in question and if the answer be in the affirmative, he should then state the means and extent of his knowledge upon the subject of the peculiar meaning of the words, and if it appears to be adequate, he may then be asked the question, "what did you understand by the words employed?" This seems to be the settled formula in such cases. (Humphreys *v.* Miller, 4 C. & P. 7; Daines *v.* Hartley, 3 Exch. 200, 206; 2 Greenl. Ev. § 417.) It is the same mode of proof as in the cases of libel published in a foreign language, or in

§ 282. Where the plaintiff, in an action for libel, had set out in his declaration an article published by the defendant in a newspaper, which the plaintiff claimed to be libelous, and, on the trial, the defendant selected a certain portion of the words of such article, which he claimed were proved to be true, and if otherwise, were not libelous, and so he prayed the court to instruct the jury; the court, after defining a libel, and pointing out what would constitute one, instructed the jury that they might consider the whole libelous matter in connection with the circumstances proved or admitted, and say what was the meaning of the writing—what it imputed to the plaintiff as to motives, objects, principles, acts and character; and if they were such as to make the writing libelous according to the definition previously given, and if it were false, and malicious, they would find the matter libelous, and sufficient to sustain the action; it was held that this direction was unexceptionable.[1] A banker, remitting the proceeds of a note sent to him for collection, appended to his letter the words, "Confidential. Had to hold over for a few days for the accommodation of L. & H.," who were the makers. Held that these words have not necessarily an injurious meaning, and that their interpretation was a matter for the jury.[2] Where the libel was copied by the defendants from another paper, with the word "fudge" added thereto, held

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cipher, in each of which cases the witness must first establish to the satisfaction of the court that he understood the language, cipher or symbol employed, before he is allowed to give to the jury his understanding of the libel. This is to prevent the jury from being misled, whose duty it is to determine, not only the application of the alleged libel to plaintiff and to his trade or business, but its real sense and meaning, and whether, in point of fact, the construction put upon the words by the averment of plaintiff, is borne out by the evidence, for if the words be susceptible of a harmless meaning, it is incumbent upon plaintiff, both by averment and evidence, to show that they were used and understood in a libelous, and not in a harmless or innocent sense. (Newbold *v.* J. M. Bradstreet & Son, 57 Md. 38; see § 384, *post.*)

[1] Graves *v.* Waller, 19 Conn 90. See Bolton *v.* O'Brien, 16 Law Jour. Ir. 97, affi'd on appeal.

[2] Lewis *v.* Chapman, 16 N. Y 369; and see Simmons *v.* Morse, 6 Jones' Law (N. Car.) 6.

that it was for the jury to say with what motive the publication was made, and whether that word was only to give a color at a future day.[1]

§ 283. Where, at the time of speaking defamatory words, the defendant qualifies them by other words, the jury are to determine from all that took place at the time, whether a crime was or was not charged; but to justify the application of this principle, the qualification or explanation must not only accompany the words, but must be sufficiently explicit to enable those who hear the same, and who are presumed to acquire all their knowledge of the transaction from what was said at the time, reasonably to understand to what the words refer, and that the meaning which the words standing alone would convey was not the meaning intended.[2]

§ 284. It is for the judge to decide whether the language is capable of the meaning ascribed to it by the innuendo, and for the jury to decide whether such meaning is truly ascribed.[3] If the judge determines that the words are not reasonably capable of the defamatory meaning ascribed to them by the innuendo, he may withdraw the case from the jury and direct a nonsuit or verdict for defendant.[4] Where the defamatory matter was concerning K., which, it was alleged, meant King George the Third, held that the jury was to decide if such was its meaning.[5]

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[1] Hunt *v.* Alger, 6 C. & P. 245; Licensed Victuallers' Soc. 22 Weekly Rep. (London) 553.

[2] Van Akin *v.* Caler, 48 Barb. 60; see §§ 134, 278. Where an article claimed as libelous is one of a series, or part of a discussion on the same subject that has been published, defendant may, for the purpose of defeating exemplary damages, introduce the whole series. (Scripps *v.* Foster, 41 Mich. 742.)

[3] Blagg *v.* Sturt, 10 Q. B. 899; 16 Law Jour. Q. B. 39; 11 Jur. 101; Cooper *v.* Greeley, 1 Denio, 361; Vanderlip *v.* Roe, 23 Penn. St. 82; Barger *v.* Barger, 18 Penn. St. R. 489; Hemmings *v.* Gasson, 1 Ell. B. & E. 346; Justice *v.* Kirlin, 17 Ind. 588; Gregory *v.* Atkins, 42 Vt. 237; Wakelin *v.* Morris, 2 Fost. & F. 26; Pittock *v.* O'Niell, 63 Penn. St. 253; Gostling *v.* Brooks, 2 Fost. & F. 76; Sweeny *v.* Michie, 1 Vict. Law Times, 43; Hays *v.* Mather, 15 Bradw. (Ill.) 30.

[4] Hunt *v.* Goodlake, 29 Law Times Rep. N. S. 473; 43 L. J. R. C. P. 54.

[5] Rex *v.* Woodfall, 5 Burr. 2661.

The judge may give his opinion that the publication complained of conveys a certain meaning, and that therefore it is libelous, but still it is for the jury to say whether or not the publication does convey the meaning which the judge ascribes to it.[1] Where the words were that the plaintiff "will lie, cheat, steal and swear," it was held that the court might, in answer to a broad request of the defendant's counsel to charge that the evidence did not support the declaration, say to the jury that these words might import that the plaintiff stole.[2] The plaintiff, D., who had worked for F. in making pill boxes by a machine owned and kept secret by F., left F., and set up a machine for making similar boxes on his own account. F., when speaking of D.'s said machine said, "D. stole my patterns to get up his castings by." Held, that it was for the jury, and not for the court, to decide whether F. intended by these words to charge D. with the crime of larceny.[3] The alleged libel stated that plaintiff had, under certain specified circumstances, been surety for another, and then asked the question why he had become such surety, and anwered by saying: There could be but one answer—he was hired for the occasion. It was left to the jury to say if this was a fair comment, and if so to find for defendant. The jury found for defendant; and on motion for a new trial, the court although being of opinion that the charge of being hired was not a just inference from the facts stated, held that the question had been correctly submitted to the jury, and refused to disturb the verdict.[4] Where the charge was, "I have a suspicion that you have robbed my house," innuendo that plaintiff had stolen certain goods of the defendant, held that it was properly left to the jury to say whether the defendant meant to impute an absolute charge

[1] Empson *v.* Fairford, W. W. & D. 10; 1 Jurist, 20.
[2] Dottarer *v.* Bushey, 16 Penn. St. 204.
[3] Dunnell *v.* Fiske, 11 Metc. 551.
[4] Cooper *v.* Lawson, 8 Adol. & El. 746.

of felony, or only a suspicion of felony.[1] In an action of slander, the words laid did not, in express terms, charge the crime, which, by innuendo, it was stated the defendant meant to impute to the plaintiff, and there was no inducement showing of what the words were spoken; the circuit judge charged, that the declaration would suffice if the jury believed that the words would well carry the meaning that had been ascribed to them. Held, that such charge was proper, and a verdict for the plaintiff was sustained.[2] The question is not whether the words complained of "are susceptible of an innocent interpretation; but whether no libelous construction can reasonably be put upon them, for if such a construction may reasonably be put upon them it is for the jury to say whether or not that is the true interpretation of them."[3]

§ 285. Whether the facts charged in the publication are true, is a question for the jury.[4] Where the charge was that plaintiff had traitorously betrayed the secrets of his government, it was held to be a question for the jury to say if he had *traitorously* betrayed the secrets of his government.[5] And where the charge was that the plaintiff was a *great* defaulter, and the proof was that he was a defaulter, held that it was for the jury to say whether he was a *great* defaulter.[6] And leaving it to the jury whether or not the defendant had made a true statement of a judicial proceeding, was held to be proper.[7]

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[1] Tozer *v.* Marshford, 6 Ex. 539; 20 Law Jour. Rep. N. S. 225, Ex; see § 163, *ante*. The legal quality of the alleged libel is for the court. It is right to charge that the publication was clearly a libel if published in the sense alleged. (Gregory *v.* Atkins, 42 Vt. 237.)

[2] Marshall *v.* Gunter, 6 Rich. 419.

[3] Ld. Coleridge, C. J., Hart *v.* Wall, 2 C. P. D. 149. Where the words alleged to be libelous are ambiguous or the sense in which they are used is doubtful, a demurrer to the complaint will be overruled, if the words are capable of a construction which would make them actionable, even although an innocent sense could be placed upon them. (Patch *v.* Tribune Asso. 38 Hun, 368.)

[4] Thomas *v.* Crosswell, 7 Johns. 264; Van Vechten *v.* Hopkins, 5 Johns. 211; Brooks *v.* Harrison, 91 N. Y. 83.

[5] Genet *v.* Mitchell, 7 Johns. 90.

[6] Warman *v.* Hine, 1 Jurist, 820.

[7] Huff *v.* Bennett, 4 Sandf. 120.

§ 286. Where the language published is unambiguous (§ 126), it is the exclusive province of the court to determine its construction, and to determine whether or not, upon its face, it is actionable *per se*,[1] or concerning the plaintiff in his professional character.[2] But the court will not withhold the case from the jury unless it can plainly see upon the face of the record that the matter charged cannot in any way be libelous.[3] On not guilty pleaded, whether the defamatory matter was published concerning the plaintiff, or whether by the person mentioned the plaintiff was intended, is a question of fact for the jury.[4] Where the declaration alleged the publication of a certain "libel concerning the plaintiff," but contained no innuendo, colloquium, or inducement to connect the publication with the plaintiff; and no evidence but the publication itself was offered to connect him therewith, it was held to be a question for the court, as a question of construction, to determine whether or not the publication referred to the plaintiff.[5] Where no extrinsic facts are

[1] Reeves *v.* Templar, 2 Jurist, 137; Matthews *v.* Beach, 5 Sandf. 256; Green *v.* Telfair, 20 Barb. 11; Fry *v.* Bennett, 5 Sandf. 24; Haight *v.* Cornell, 15 Conn. 74; Mix *v.* Woodward, 12 Conn. 262; Thompson *v.* Grimes, 5 Ind. 385; M'Kinly *v.* Rob, 20 Johns. 351; Archbold *v.* Sweet, 5 C. & P. 219; 1 Mo. & Rob. 162; Kerr *v.* Force, 3 Cranch C. C. 8; The State *v.* The Banner Publishing Co, xxii The Reporter, 442, 16 Lea, 176; Lyon *v.* Guild, 5 Heisk. (Tenn.) 183; Donaghue *v.* Gaffy, 54 Conn. 257; see *ante*, § 281.

[2] Tomlinson *v.* Brittlebank, 1 Har. & W. 573.

[3] Fray *v.* Fray, 17 C. B. N. S. 603; Mawe *v.* Pigott, Ir. Rep. 4 Com. Law, 54; Twombly *v.* Monroe, 136 Mass. 464; Donaghue *v.* Gaffey, 54 Conn. 257; Beazley *v.* Reid, 68 Ga. 380. By the court in Teacy *v.* M'Kenna (Ir. R. 4 Com. Law, 374), in overruling a demurrer to the declaration, "It is enough that the court are not prepared to decide that this document is not capable of a construction in any reasonable sense that would make it a libel." In England since the common-law procedure act of 1852 (15 & 16 Vict. ch. 76), if the words are capable of any defamatory meaning, the case must be left to the jury. (Watkin *v.* Hall, Law Rep. 3 Q. B. 396; Mulligan *v.* Cole, Law Rep. 10 Q. B. 550; Hart *v.* Wall, 2 C. P. D. 149.) By statute in Mississippi and Virginia, demurrer does not prevent jury from passing on the intent of the publication. (See *ante*, p. 239, note 5.)

It is proper for the court to refuse to instruct the jury that the article is not libelous. That instruction would be proper only in case the language was incapable of a construction injurious to plaintiff. (Sanderson *v.* Caldwell, 45 N. Y. 401.)

[4] Van Vechten *v.* Hopkins, 5 Johns. 211; Green *v.* Telfair, 20 Barb. 11; Hodson *v.* Home, 1 Brod. & Bing. 7; Kerr *v.* Force, 3 Cranch C. C. 8.

[5] Barrows *v.* Bell, 7 Gray (Mass.) 301.

offered in evidence, or if the language is ambiguous, the question of libel or no libel is, in a civil action, a question of law;[1] and as neither the statute of 32 George the Third, enabling the jury to give a general verdict in an action for libel, nor the similar provision in the Revised Statutes of New York, apply to civil actions,[2] the judge may charge the jury whether or not, as a question of law, a publication is libelous on its face,[3] and it is the duty of the jury to follow the instructions of the judge.[4] It is the practice for the judge first to give a legal definition of libel, and then to leave it to the jury to say whether the facts necessary to constitute that offense have been proven to their satisfaction.[5] The judge may state under what circumstances language in itself actionable may be spoken with impunity, and by way of illustration put a case differing in some respects from that before the court.[6] He is bound, upon a proper motion, to rule whether or not the declaration sets

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[1] Snyder *v.* Andrews, 6 Barb. 43.

[2] Hunt *v.* Bennett, 19 N. Y. 173; Levi *v.* Milne, 4 Bing. 195; Snyder *v.* Andrews, 6 Barb. 55; Dolloway *v.* Turrill, 26 Wend. 399; Reeves *v.* Templar, 2 Jur. 137.

[3] Darby *v.* Ouseley, 1 Hurl. & N. 1; Wagaman *v.* Byers, 17 Md. 183; Hunt *v.* Bennett, 19 N. Y. 173. See § 281, *ante*.

[4] Hakewell *v.* Ingram, 2 Com. Law Rep. 1397; The State *v.* Jeandell, 5 Harring. (Del.) 475; and see Duffy *v.* The People, 26 N. Y. 588; Rex *v.* Burdett, 4 B. & Ald. 131; 2 Bennett & Hurd Lead. Cr. Cas. 388; The State *v.* Croteau, 23 Vt. 14; U. S. *v.* Morris, 1 Curtis, 53; Baylis *v.* Lawrence, 11 Adol. & El. 925; Rex *v.* Dean of St. Asaph, 21 How. St. Tr. 847; 3 T. R. 428, note; Sixth Rep. of Crim. Law Comm'rs, A. D. 1841; Forsyth's Hist. of Trial by Jury, 268; 2 Camp. Ch. Justices, 478; 3 *Id.* 56; Rex *v.* Miller, 20 How. St. Tr. 892; Rex *v.* Woodfall, 5 Burr. 2661; Shattuck *v.* Allen, 4 Gray, 541; Commonwealth *v.* Anthes, 5 Gray, 185; Commonwealth *v.* Porter, 10 Metc. 263; Goodrich *v.* Davis, 11 Metc. 473; Commonwealth *v.* Abbott, 13 Metc. 120; Pierce *v.* The State, 13 N. Hamp. 536; The People *v.* Crosswell, 3 Johns. Cas. 337.

[5] Parmiter *v.* Coupland, 6 M. & W. 105; Cox *v.* Lee, Law Rep. 4 Ex. 288; and see Stannus *v.* Finlay, Ir. Rep. 8 Com. Law, 264; Shepheard *v.* Whitaker, Law Rep. 10 C. P. 502. The court having charged that if the language complained of had a tendency to injure plaintiff in his profession they were libelous; properly refused to charge that a statement that plaintiff is suffering from overwork, and his mental condition is not good, and there has been trouble in the affairs of the bank (of which plaintiff was teller) occasioned by plaintiff's mental derangement, and that his statements when he was probably not responsible for them have caused bad rumors, are libelous *per se*. (Moore *v.* Francis, 3 N. Y. Suppl. 162.)

[6] Taylor *v.* Robinson, 29 Maine, 323.

forth a cause of action.[1] But in charging the jury, the judge is not bound to give his opinion as to the nature of the publication as a matter of law.[2] And where the judge charged, "I find a difficulty in saying whether it (the publication) is a libel or not. Gentlemen, can you assist me?" a motion for a new trial on the ground of misdirection was denied.[3] But it is no misdirection that the judge, in addition to leaving the proper questions to the jury, stated his own opinion as to the libelous nature of the publication.[4] Although the judge, on the general issue, is to leave

[1] Shattuck *v.* Allen, 4 Gray (Mass.) 540; Matthews *v.* Beach, 5 Sandf. 256.

[2] In Parmiter *v.* Coupland, 6 M. & W. 105, the judge, after telling the jury what constituted a libel, left it to them to say whether the publication in question was or was not injurious to plaintiff. The jury having found for defendant the court above set it aside because the jury had erred in their decision. In Mulligan *v.* Cole, L. R. 10 Q. B. 549, the judge directed a nonsuit on the ground that the publication was not capable of the meaning attributed by the innuendo. In Capital & Counties B'k *v.* Henty, 5 C. P. Div. 574, the question of libel or no libel was left to the jury; they failed to agree and were discharged. On motion to enter judgment for defendant it was held the words were susceptible of the meaning attributed by the innuendo, and that the case should again go to a jury. The Court of Appeals reversed this last decision, and the House of Lords sustained this reversal, holding the words were not libelous, that the innuendo was not warranted; there was no case for a jury and that defendants were entitled to judgment. (L. R. 7 App. Cas. 741, and see Snyder *v.* Andrews, 6 Barb. 43.) In Pennsylvania the rule is otherwise; there the court is bound to instruct the jury whether the publication is or is not libelous. (Pittock *v.* O'Niell, 63 Penn. 253.)

[3] Baylis *v.* Lawrence, 3 Perr. & D. 526.

[4] Darby *v.* Ouseley, 1 Hurl. & N. 1; Snyder *v.* Andrews, 6 Barb. 55; and see Empson *v.* Fairford, W. W. & D. 10; 1 Jurist, 20; *ante*, § 281. Where a card published by plaintiff was received in evidence in mitigation of damages, and the court spoke of the card as "a mere piece of egotism," on a verdict for plaintiff, the court reduced the damages one-half, held that if the remark concerning the card was unauthorized, the error was compensated by the reduction of damages. (Massauere *v.* Dickens, 70 Wis. 83.) In an action for slander in calling plaintiff a thief and a whore; as to the charge of thief, defendant justified on the ground of truth, setting up certain transactions referred to on the trial as the "currant transactions" and the "apple transactions." The judge, in his charge stated, "It is due to good order in society and common decency among neighbors that you should look to it, if convinced defendant made these charges that he should respond in such damages as you think plaintiff is entitled to for having charged her with those crimes, and it is well, in my judgment, for defendant, no matter if his version of these transactions be a correct version; it is well for him to drop this currant transaction and to cease talking about these currants. He has talked about them, in my judgment, long enough, and it is time he stopped talking about this apple transaction and live in peace and comity with his neighbors." Defendant excepted to

it to the jury whether, under the circumstances, the publication is a libel, yet if on that issue in a case in which no question is made as to the fact of publication, nor as to its application to the plaintiff the jury find a verdict for the defendant, the court will set aside the verdict.[1] And where the action was for calling the plaintiff a thief, and the defense was that the defendant so explained the words that the charge did not amount to an imputation of felony; the court being of opinion that the defense failed, charged the jury that the plaintiff was entitled to a verdict, and that the only question for them to determine was the amount of damages. The defendant excepted to this charge, and on appeal the charge was held to be proper.[2]

§ 287. Where the circumstances of the publication are controverted or uncertain, a case is presented in which the court is to instruct the jury what condition of circumstances would render the publication privileged, and then leave it to the jury to determine the character of the publication, and give a verdict accordingly. For the jury cannot decide whether a libel was published on a justifiable occasion, without being told by the court what facts would constitute such an occasion.[3] The uncertainty as to the facts may consist in the happening or not happening of certain events, or in the question whether or not the language exceeded the privileged limits.

§ 288. The facts being uncontroverted, the court is to

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this part of the charge. Plaintiff had a verdict for $150. On appeal a new trial was granted: Because the judge expressed an opinion calculated to influence the decision of the jury in a matter within their sole cognizance, the amount of damages. (Richards *v.* Van Nostrand, 43 Hun, 299.) The amount of damages awarded seems to indicate that the jury were not influenced to defendant's prejudice by the judge's charge.

[1] Hakewell *v.* Ingram, 2 Com. Law Rep. 1397; and see Levi *v.* Milne, 4 Bing. 195; Long *v.* Eakle, 4 Md. 454; Usher *v.* Severance, 20 Maine, 9; Goodrich *v.* Davis, 11 Metc. 474.

[2] Van Akin *v.* Caler, 48 Barb. 58.

[3] Duncan *v.* Brown, 15 B. Mon. 186.

determine whether or not the publication is privileged.[1] If a defendant desires to have the question of privilege submitted to the jury, he must so request upon the trial. Unless he so requests he cannot, upon appeal, claim that such submission should have been made. A motion for a nonsuit does not raise the question as to the character of the publication, as privileged or not privileged.[2] If the court decides that the publication is *absolutely* privileged, that of course determines the action; if the court decides the publication is *conditionally* privileged then it is a matter of law for the court to determine whether there is any *intrinsic* or *extrinsic* evidence of malice. If the court decides this question in the negative, it directs a nonsuit or a verdict for the defendant, without refer-

[1] Darby *v.* Ouseley, 1 Hurl. & N. 1; Wenman *v.* Ash, 13 C. B. 836; Briggs *v.* Garrett, 2 Atl. Rep. 513; Neeb *v.* Hope, 111 Penn. St. 145; Press Co. *v.* Stewart, 119 Penn. St. 584; Locke *v.* Bradstreet, 22 Fed. Rep. 771; Merivale *v.* Carson, 20 Q. B. D. 275; Halstead *v.* Nelson, 13 N. Y. St. Rep. 211. If there is no request to submit the question of malice to the jury, the objection that the judge omitted to submit that question cannot be raised on appeal. (Van Aernam *v.* Bleistien, 2 N. Y. St. Rep. 470; 102 N. Y. 355.) Lord Chief Justice Cockburn, in his "Second letter on the proposed New Criminal Code," expresses an opinion that the rule which declares the question of privilege to be one of law for the judge to determine "involves a legal anomaly," because "the rule of law being that a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, public, social, moral or domestic, if made to a person having a corresponding interest or duty, is privileged, the question of privilege in respect of the particular communication—in other words, the application of the rule—depends on two questions: first, whether the interest or duty existed; secondly, whether, if so, the communication was honestly made in furtherance of the interest or in performance of the duty, or whether the occasion was abused for the gratification of individual malice, in which latter case the privilege fails. But both these questions, the existence of the interest or duty and honesty of purpose, are purely questions of fact, and the rule which leaves the decision of the first to the judge involves a departure from principle and ought not to be further extended." Mr. Flood (Flood on Libel, 376), after citing the above extract, states that it "forcibly illustrates" an "anomaly." For ourselves we are unable to discover any anomaly. Every question of law rests upon a question of fact, and it cannot be intended to arraign the principle that questions of law are for the court; we understand it is intended only to apply to the particular question of law to which reference is made. It is in those cases only in which the facts are *uncontroverted* that the judge decides whether or not the publication is privileged.

[2] Van Aernam *v.* Bleistien, as Pres't, &c., 2 N. Y. State Rep. 470; 102 N. Y. 355; Brooks *v.* Harrison, 91 N. Y. 89.

ence to the jury.[1] But if the court decides there is any evidence, either in the language of the publication itself (intrinsic evidence), or in the circumstances of its publication, from which a want of good faith or a bad intent (malice) on the part of the publisher may be inferred, it then becomes the duty of the court to submit to the jury,[2] with appropriate instructions, and as a question of fact for their determination, whether in making the publication the publisher acted in good faith or otherwise;[3] for the question of malice in such a case is always a question of fact to be determined by the jury.[4] Thus, where defendant had

[1] Cooke *v.* Wildes, 5 El. & Bl. 328; Somerville *v.* Hawkins, 10 C. B. 583; Taylor *v.* Hawkins, 16 Q. B. 308; Harris *v.* Thompson, 13 C. B. 333; Wenman *v.* Ash, *Id.* 836; Mulligan *v.* Cole, Law Rep. 10 Q. B. 550; Caulfield *v.* Whitworth, 18 Law Times, N. S. 527; Fry *v.* Bennett, 5 Sandf. 54; Jarvis *v.* Hatheway, 3 Johns. 180.

[2] Jury to determine good faith and truth of statement. (Brooks *v.* Harrison, 91 N. Y. 83.)

[3] Lancey *v.* Bryant, 30 Maine (17 Shep.) 466; Powis *v.* Smith, 5 B. & Ald. 850; Abrams *v.* Smith, 8 Blackf. 95; Mitchell *v.* Kerr, Rowe's Rep. 537; Cosgrave *v.* The Trade Auxiliary Soc. Ir. Rep. 8 Com. Law, 349. Defendant is not required to give any evidence of the truth of the fact alleged or of his *bona fide* belief in them, before the judge can decide whether the occasion was privileged. Intrinsic evidence of actual malice, *e. g.*, imputations upon private character, take the case out of the hands of the judge, and make it necessary that the jury shall decide as to its existence; the truth of the facts stated, or the defendant's honest belief in them, is an element in the question of actual malice. (Williams *v.* Spowers, 8 Vict. L. R. L. 82.)

[4] White *v.* Nicholls, 3 How. U. S. Rep. 266; Blackburn *v.* Blackburn, 4 Bing. 395; Robinson *v.* May, 2 J. P. Smith, 3; Bodwell *v.* Osgood, 3 Pick. 379; Toogood *v.* Spyring, 1 Cr. M. & R. 181; Bromage *v.* Prosser, 6 D. & R. 296; Haight *v.* Cornell, 15 Conn. 74; Clapp *v.* Devlin, 35 N. Y. Sup. Ct. (3 Jones & S.) 170; Zuckerman *v.* Sonnenschein, 62 Ill. 115; Gardner *v.* Slade, 13 Ad. & Ell. N. S. 796; Pattison *v.* Jones, 8 B. & C. 578; DeMustre *v.* Syme, 9 Vict. L. R. L. 10; Moran *v.* Lyon, 4 *Id.* 379; Pearce *v.* Brower, 72 Ga. 243; see §§ 388, 399, *post*. Clark *v.* Molyneux, 3 Q. B. D. 237, the plaintiff, a clergyman, complained that defendant had published libelous matter concerning him. Upon the trial the presiding judge held that the publication was conditionally privileged, and left the question of malice to the jury as thus: In law if one published what is libelous of another, it is presumed to be malicious; but when the occasion is privileged then you require something more; you require what the law calls *express malice*. I must tell you what express malice means; it does not mean that hatred and uncharitableness which are usually associated with the word malice. Malice, in law, means a wrongful act done intentionally without just excuse. When you come to look at the word malice you will have to consider it this way: Was there an intentional act done without excuse, and did defendant act in the honest belief that his statements were true; not merely that he believed them, but that he honestly believed them, which means that *he had good ground for believing them*. This and much more, and the jury found for the p aintiff. A rule for a new trial was discharged, and on appeal the judgment was re-

charged plaintiff with stealing, and had her searched for a broach missing, but afterwards found in defendant's possession, held to be a question for the jury whether the charge was made *bona fide*, and that the circumstances and occasion of making it should be left to their consideration.[1] To entitle a plaintiff "to have the question of malice submitted to the jury, it is not necessary that the evidence should be such as *necessarily* leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence;"[2] and where the only evidence of malice was claimed to be on the face of the publication, held that it ought to have been left to the jury to determine whether there was any malice.[3] But where the libel purported to be the report

versed and a new trial granted, three judges giving opinions at length, the effect being (1) that the charge was erroneous, in holding that the defendant must have honestly believed his statements to be true and have good ground for making them, and (2) that the verdict was against the weight of evidence. The report should be consulted.

[1] Padmore *v.* Lawrence, 3 Perr. & D. 209. Court to leave *bona fides* to jury, and then to determine whether or not the publication is privileged. (Stace *v.* Griffith, Law Rep. 2 Pri. C. C. 420; 20 Law Times, N. S. 197; Little *v.* Clements, 1 Ir. C. L. Rep. 194.) Whether or not the occasion gives the privilege is a question of law. Whether or not the defendant has fairly conducted himself in the execution of the privilege is a question of fact for the jury. (Dickson *v.* Earl Wilson, 1 Fost. & F. 419; and see George *v.* Goddard, 2 Fost. & F. 689; McBee *v.* Fulton, 47 Md. 403.) Where from the use of words actionable *per se* malice is implied, the presumption may be rebutted by circumstances. The words may be shown to have been used with reference to a known act and to have been so understood by those present. It is proper to submit the intention of the publication to the jury. (Welker *v.* Butler, 15 Bradw. [Ill.] 209; see *ante*, note 2, p. 121.) Where the jury returned a verdict of $1,375.03, held that the amount was not sufficient evidence of a compromise verdict. It was held to be rather an evidence of "a *very exact* estimate of damages" than the result of a compromise. (Meyer *v.* Press Pub. Co. 46 N. Y. Superior Ct. 127, 131.)

[2] Somerville *v.* Hawkins, 10 C. B. 583; and see Taylor *v.* Hawkins, 16 Q. B. 308; Harris *v.* Thompson, 13 C. B. 333; Wenman *v.* Ash, 13 C. B. 836; Henwood *v.* Harrison, Law Rep. 7 C. P. 606.

[3] Gilpin *v.* Fowler, 9 Ex. 615; 18 Jur. 292; Jacob *v.* Lawrence, 4 L. R. Ir. Q. B. C. P. & Ex. D. 579. Held erroneous to charge jury that plaintiff had no cause of action unless words were understood by the hearers in a malicious sense. (Jarnigan *v.* Fleming, 43 Mo. 710; but see Nelson *v.* Borchenius, 52 Ill. 236.)

of a proceeding in the insolvent court, and imputed to the insolvent's landlord (plaintiff) that he colluded with the insolvent in putting in a fictitious distress; held that the judge ought not to have left it as a question to the jury whether the defendant *intended* to injure the plaintiff, but that if he thought the tendency of the publication injurious to the plaintiff, he ought to have told them it was actionable, and the plaintiff entitled to a verdict.[1]

§ 289. The amount of damages is to be determined by the jury,[2] but the court should instruct them as to the rules by which they should be governed in fixing the amount.[3] A general instruction to find such damages as under all the circumstances they thought right, was held to be improper.[4] So a charge that "a good way for them (the jury) to do was to bring the question home to themselves and say for what sum would they, with their knowledge of the world and of mankind, and of the result of a defamation, be willing to be libelled as the plaintiff was libelled," was held to be error. Such a rule would be a dangerous one to adopt in the administration of the law,[5] It was held no

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[1] Haire *v.* Wilson, 9 B. & C. 643. Plaintiff was arrested on a charge of robbery, and twice arraigned before a magistrate. Defendant published in a newspaper reports of the proceedings; one report was headed "Daring robbery," and the other "Charge against a barmaid." It appeared in evidence that the report in manuscript was headed "*Unfounded* charge against a barmaid," but the word unfounded was omitted in the report as published. On the trial a nonsuit was ordered, but a new trial was granted. (Street *v.* Licensed Vitualer's Soc., 22 Weekly Rep. 553.)

[2] Mankleton *v.* Lilly, 3 N. Y. St. Rep. 422; Shattuc *v.* McArthur, 29 Fed. Rep. 136; Fleming *v.* Albeck, 67 Cal. 226; Erber *v.* Dun, 12 Fed. Rep. 526.

[3] True *v.* Plumley, 36 Maine, 466. Held that in directing the jury as to damages, it was not necessary for the judge to caution the jury as to the amount of injury sustained, by telling them to take into consideration the fact that one publication only had been proved, and that a mere sale to the plaintiff's agent of a copy of the paper containing the libel. (Brunswick *v.* Harmer, 14 Q. B. 189.) If there was only one witness to the speaking of words charging theft, and he testifies that his opinion of the person slandered was not thereby affected, and that he still believed him to be honest, yet, if the words were spoken maliciously, it is erroneous to limit the jury to nominal damages. (Markham *v.* Russell, 12 Allen [Mass.], 573.)

[4] Duncan *v.* Brown, 15 B. Mon. 186.

[5] Prescott *v.* Tousey, 50 N. Y. Superior Court, 12, 17.

ground for exception that the judge *advised* the jury to give only nominal damages.[1] A charge that compensatory damages are to be given where the publication is without malice, and that compensatory damages are such as will repay the costs and trouble of the suit and of disproving the defendant's allegations, was held right,[2] although it has been held erroneous to charge the jury to take into consideration the expense to which the plaintiff has been put by being compelled to come into court to vindicate his character.[3] It has been usual in the English courts to tell the jury that they are not to consider the effect of the verdict upon the costs.[4] In New York, it seems always

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[1] Matthews *v.* Beach, 5 Sandf. 256. Where the judge recommended the jury to give nominal damages, but the jury gave £5 damages, the court refused to set the verdict aside. (Chilvers *v.* Greaves, 5 M. & G. 578.) The right of the court to direct a verdict for nominal damages doubted. (Strong *v.* Kean, 13 Irish Law Rep. 93; and see Sanderson *v.* Caldwell, 45 N. Y. 398.) Where the publication complained against was the publication, in the defendant's newspaper, of a printed report of a committee of investigation distributed to the shareholders in a company, the judge charged the jury that although the publication by the defendant was unauthorized, yet, as the publication to the shareholders was authorized, they might give nominal damages. (Davis *v.* Cutbush, 1 Fost. & F. 487.) In an action against a newspaper for publishing a libelous item of news, the proprietors not having acted with express malice, and not having shown negligence in their choice of reporters, *held* that exemplary damages should not have been allowed. (Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447. *Contra* see Regensperger *v.* Kiefer, 7 Atl. Rep. 724.) As to the rule of damages in New York for acts of servants, see Murphy *v.* Cent. Park R. R. Co. 48 N. Y. Superior Ct. 96; Hendrick *v.* Sixth Av. R. R. Co. 44 *Id.* 9; Burke *v.* N. Y. & Greenwood Lake R. R. 30 Hun, 47; Cleghorn *v.* N. Y. & H. R. R. R. 56 N. Y. 44.

[2] Armstrong *v.* Pierson, 8 Clarke (Iowa), 29; Pearce *v.* Brower, 17 The Reporter, 490 (Ga.); 72 Ga. 243.

[3] Hicks *v.* Foster, 13 Barb. 663. In Wakelin *v.* Morris (2 Fost. & F. 27) the defendant's counsel proposed to put a question to plaintiff's attorney, as to what would be the probable cost to the defendant if the verdict was for nominal damages only, and the question was admitted.

[4] The effect of the verdict upon the costs is to be laid entirely out of consideration, and with which the jury have nothing to do. (Mears *v.* Griffin, 2 Sc. N. R. 15; and see Poole *v.* Whitcomb, 12 C. B. N. S. 770; Levi *v.* Milne, 4 Bing. 195.) And so recently as 1868, sittings, after Mich. Term, in an action of libel (Bradlaugh *v.* Brooks), the jury, after retiring to consider their verdict, returned into court and inquired of the Judge (Blackburn, J.), what amount of damages would carry costs; he declined to inform them, saying that, according to law, the costs follow the verdict, and a verdict ought not to be given which depends upon the law as to costs. And in Wilson *v.* Reed (2 Fost. & F. 149), the court refused to inform the jury what amount of damages would carry costs. In California the same rule seems to prevail. (See Shay *v.* Tuolumne Water Co. 6 Cal.

to have been the rule in actions of tort to inform the jury of the effect of the verdict upon the costs.[1] And at least some of the judges in the courts of England are disposed to follow the rule prevailing in New York. Where, on a motion for a new trial, on the ground that the jury had given a verdict for a small amount of damages, under the erroneous impression that it was an amount sufficient to carry costs, the rule was refused; but by Pollock, Ch. B., "There is no reason why the jury should not be informed, if they ask it (what amount of verdict will carry costs), as it is a part of the law, but if they do not ask it, and they have given their verdict, it cannot be disturbed merely because they did not know it."[2] In a case tried before Erle, Ch. J., he charged the jury: "If you believe that the plaintiff really was required to bring this action to vindicate his character, then you may think it proper to give substantial damages which will carry costs. But if you think that it was not so, and that the words did no real injury, you can find nominal damages, which will not carry costs;" and upon the jury asking what sum would carry costs, the judge answered, "I am not aware that there is anything to preclude my telling you," and he told them.[3] In an action of slander for words imputing unchastity to the plaintiff, the jury were instructed that the rule with respect to damages was to give such as were commensurate with the injury sus-

286.) Rule in Michigan, see Steketee *v.* Kim, 48 Mich. 322. Effect of the verdict on costs, see § 296, *post*.

[1] Elliott *v.* Brown, 2 Wend. 500; Nolton *v.* Moses, 3 Barb. 31; Waffle *v.* Dillenback, 38 N. Y. 53. Such an instruction not proper in an action or contract. (Munson *v.* Curtis, 17 N. Y. St. Rep. 349.)

[2] Kilmore *v.* Abdoolah, 27 Law Jour. Ex. 307. But on the same occasion Bramwell, B., said: "The jury have no right to give a verdict with reference to anything else than the injury sustained by the plaintiff." Where, on the execution of a writ of inquiry in an action for slander, the jury were incorrectly informed by the undersheriff as to the amount of damages which would carry costs, and they found a verdict for less than forty shillings, it was held no ground for a new writ of inquiry, or for increasing the amount of damages. (Grater *v.* Collard, 6 Dowl. 503.) The jury cannot, by their verdict, give costs. A verdict that defendant should pay $1 damages and the costs of the suit was set aside. (Campbell *v.* Linton, 27 Up. Can. Q. B. 563.)

[3] Wakelin *v.* Norris, 2 Fost. & F. 26; and see in a note to that case.

tained by the acts charged and proved against the defendant;[1] that if the plaintiff was an innocent and virtuous female, and her character had been destroyed by the slanders of the defendant and others, they might give liberal damages; but if the plaintiff had so destroyed her character, by her own lewd and dissolute conduct, as to have sustained no injury from the words spoken by the defendant, they might give only nominal damages. This was held correct.[1] Where the defendant suffers judgment to go by default, and the damages are assessed by a sheriff's jury, although the plaintiff gives no evidence of damage, the jury are not confined to nominal damages.[2] Where the language is actionable *per se*, the mere fact that special damage is alleged will not prevent the plaintiff, on failing to establish his special damages, from recovering general damages.[3] But where the language is actionable only by reason of the special damages, plaintiff cannot recover general damages.[4]

§ 290. In general, prospective damages are not to be allowed, and damages arising after suit brought are not to be taken into account,[5] although it has been held that the jury are to consider the probable future as well as the actual past;[6] and in an action of libel upon copartners, held

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[1] Flint *v.* Clark, 13 Conn. 361. See Mitigation.

[2] Cotterell *v.* Jones, 11 C. B. 713; Tripp *v.* Thomas, 3 B. & C. 427; *ante*, § 274.

[3] Smith *v.* Thomas, 2 Bing. N. C. 380; Brown *v.* Smith, 13 C. B. 596; Evans *v.* Harris, 1 Hurl. & N. 254.

[4] Albrecht *v.* Patterson, 12 Vict. Law Rep. L. 821; this was qualified in a case where the charge was want of chastity of an unmarried woman. (White *v.* Jordan, 6 *Id.* 11.)

[5] Goslin *v.* Corry, 7 Mann. & G. 343; Keenholts *v.* Becker, 3 Denio, 346; Stitzell *v.* Reynolds, 59 Penn. St. 488; 67 *Id.* 54; Phil. R. R. Co. *v.* Quigley, 21 How. U. S. Rep. 202; Mayne on Damages, 277. As to future damages in actions *ex delicto*, see 36 Alb. L. J. 84, 104.

[6] True *v.* Plumley, 36 Maine, 466; Harrison *v.* Pearce, 1 Fost. & F. 567. Mayne on Damages, 421, lays down the rule as thus: Where words are actionable without special damage, the jury may take into consideration not only the injury that *has* arisen, but that which may arise from the slander, because such fresh injury would constitute no fresh ground of action. But if the words are not actionable *per se* the jury, in computing damages, ought only to consider the damage which is specially alleged and proved, because if any damage be at any future time sustained a subsequent action will lie for it.

the jury might consider the prospective injury to the co-partnership;[1] and in a case of libel on the plaintiff in connection with a steam vessel, he was allowed to show diminished earnings of the vessel subsequent to the bringing of the action.[2] Where, in consequence of the defamation the plaintiff lost an office dependent on the will of his superior, it was held the jury were to consider both the nature and tenure of the office, and not give the value of an annuity certain.[3] Where the damage proved was the loss of a situation of fifty pounds a year, and the jury gave a verdict for sixty pounds, the court refused to disturb it.[4] Mental suffering and sickness induced by the publication are not such natural consequences of defamation as to amount to special damage,[5] and in a joint action by partners it was held that no damages could be given for any injury to the private feelings of the plaintiffs, but only for such injury as they had sustained in their joint trade.[6] The jury must give some damages,[7] and *where actual ill-will is*

[1] Gregory *v.* Williams, 1 Carr. & K. 568.

[2] Ingram *v.* Lawson, 6 Bing. N. C. 212.

[3] Lever *v.* Torrey, 1 Murray, 350.

[4] Jackson *v.* Hopperton, 16 C. B. N. S. 829.

[5] Terwilliger *v.* Wands, 17 N. Y. 54; Wilson *v.* Goit, 17 N. Y. 442; overruling Bradt *v.* Towsley, 13 Wend. 253; Fuller *v.* Fenner, 16 Barb. 333, and Swift *v.* Dickerman, 31 Conn. 285. No inquiry can be had of injury to persons other than to a party plaintiff, *i. e.*, to the wife of plaintiff, as that she took sick and died. (Guy *v.* Gregory, 9 C. & P. 584. See § 391, *post*, and § 200, *ante*.)

[6] Haythorn *v.* Lawson, 3 Car. & P. 196; Donaghue *v.* Gaffy, 54 Conn. 257. In an action of libel against two persons, one of them suffered judgment by default, the other pleaded "not guilty;" questioned if the damages could be jointly assessed. (Note to Watts *v.* Fraser, 7 A. & E. 233.)

[7] Jewett *v.* Whitney, 43 Maine, 242; although it may be shown that defendant was benefited by the defamation. It will not be permitted the defendant to attempt to show that the plaintiff was benefited by the alleged libel. Such an attempt was made in Fry *v.* Bennett, 5 Sandf. 76; and see Baylis *v.* Lawrence, 11 Ad. & El. 924; see *post*, Mitigation, § 417. Where there are mitigating circumstances and no express malice, plaintiff is entitled to such damages as will compensate him and make him whole for outraged feelings and his expenses of suit. (Shattuc *v.* McArthur, 29 Fed. Rep. 136; Finney *v.* Smith, 31 Ohio St. 529; Bradstreet Co. *v.* Gill, 9 So. East. Rep. [Texas] 753.) Damages against mercantile agencies. (Erber *v.* Dun, 12 Fed. Rep. 526; King v. Patterson, 49 N. J. L. R. 417.) Damages on charge of inconstancy against married woman under Code of North Carolina. (Bowden *v.* Bailes, 101 N. C. 612.)

Where libelous language is inserted in a newspaper by a reporter,

shown, they may give exemplary or vindictive damages.[1] The damages cannot exceed the amount claimed, and a direction to that effect is proper;[2] and where the plaintiff had a verdict for more damages than he claimed in his declaration, the court refused him leave to amend the declaration so as to keep the verdict.[3]

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without the knowledge or consent of the proprietor, the latter is liable to the extent of compensatory damages. He can, however, be visited with punitive damages only, upon proof from which his approval of his employee's conduct may be legally inferred. (Haines *v.* Schultz, 50 N. J. L. R. 481.) This accords with the general rule of damages against an employer for the acts of his employee. (Murphy *v.* Cent. R. R. Co. 48 N. Y. Superior Court, 96; Caldwell *v.* N. J. Steamboat Co. 47 N. Y. 282; Field on Damages, § 85.) It is proper to charge that unless the defendant was moved by actual malice it is not a case for punitive damages (Hamilton *v.* Eno, 81 N. Y. 116); but a request so to charge, which in addition added, That the jury should give such damages only as they thought the plaintiff had actually sustained, was rightly refused. (*Id.*) Where the words are actionable *per se* the law requires no proof of actual injury to entitle the plaintiff to recover such amount as the jury deem just. (Neeb *v.* Hope, 111 Penn. St. 145; Bergman *v.* Jones, 94 N. Y. 52.)

If the jury are satisfied that there was actual malice or gross negligence they may allow punitory damages. (Klewin *v.* Bauman, 53 Wis. 244; Lanius *v.* Druggist Pub. Co. 2 West. Mo. App. 440; Templeton *v.* Graves, 59 Wis. 95; Bowden *v.* Bailes, 101 N. C. 612; Montgomery *v.* Knox, 23 Fla. 595; Erber *v.* Dun, 12 Fed. Rep. 526.) There are decisions that no punitive damages should be allowed unless upon proof of *actual* malice. (Evis-ton *v.* Cramer, 57 Wis. 570.)

[1] Taylor *v.* Church, 8 N. Y. 452; Hunt *v.* Bennett, 4 E. D. Smith, 647; 19 N. Y. 173; Fry *v.* Bennett, 4 Duer, 247; Kinney *v.* Hosea, 3 Harring. 397; Gilreath *v.* Allen, 10 Wend. 67; Cramer *v.* Noonan, 4 Wis. 231; Hosley *v.* Brooks, 20 Ill. 115; Cowell *v.* Day, 18 Week. Dig. 97; Shattuc *v.* McArthur, 29 Fed. Rep. 136; Bradley *v.* Cramer, 67 Wis. 415; Snyder *v.* Fulton, 34 Md. 128; Knight *v.* Foster, 39 N. Hamp. 576; Montgomery *v.* Knox, 23 Fla. 595. The right to give vindictive damages was questioned. (See Austin *v.* Wilson, 4 Cush. 273; Taylor *v.* Carpenter, 2 Wood. & M. [U. S.] 1; 2 Greenl. Ev. tit. Damages; Sedgwick on Damages, Appendix, 1st ed. and 4th ed. p. 532.) But the right is now universally conceded, and held that vindictive damages might be given, although defendant had previously been indicted for the same offense, and fined. (Bundy *v.* Maginess, 18 Pac. Rep. 668; Cook *v.* Ellis, 6 Hill, 467.) Vindictive damages are awarded as a punishment against a wrongdoer, and not as compensation for the injured person. (Sheik *v.* Hobson, 64 Iowa, 146.) Where the libel charges an indictable offense, punitive damages may be given without other proof than the publication itself of express malice. (Regensperger *v.* Kiefer, 7 Atl. R. [Pa.] 724; Kuhn *v.* Chicago, M. & St. Paul, 74 Iowa, 137; Roswater *v.* Hoffman, 24 Neb. 222.) In Sheik *v.* Hobson, 64 Iowa, 146, it was held that where, in an action for slander, the right of action by statute survives the death of defendant, the plaintiff cannot recover punitive damages against the representatives of defendant.

[2] Pool *v.* Devers, 30 Ala. 672.

[3] Curtiss *v.* Lawrence, 17 Johns. 111. The declaration may, it seems, be amended on the terms of submitting to a new trial (Bowman *v.* Earle, 3 Duer, 691), if the defendant insists on a new trial. (Corning *v.* Corning, 6 N. Y. 98.)

§ 291. Where there are several counts, and a verdict is entered generally on all the counts, and entire damages are given, if one count is bad, the judgment will be arrested, and a *venire de novo* awarded.[1] But if the judge who tried the cause certifies that the evidence applied only to the good counts, or it is otherwise apparent that the defective count has not influenced the amount of the verdict, the verdict will be amended by confining it to the good counts. Where there is any doubt as to any one count, it is prudent to have the damages assessed severally, or to abandon the doubtful count, and take a verdict on the other counts only.[2] By a defective count is meant a count which shows no cause of action; a count which contains actionable words, together with words not actionable, would not be defective so as to affect a verdict on such count. In such a case, it is intended that the verdict applied only to the actionable words.[3]

[1] Cox *v.* Lee, Law Rep. 4 Ex. 287; 38 Law Jour. Ex. 219.

[2] See 2 Stark. Sland. 107; Heard on Libel, §§ 303, 304; Fry *v.* Bennett, 28 N. Y. 326; Holt *v.* Scholefield, 6 T. R. 694; Lloyd *v.* Morris, Willes R. 443; Burnet *v.* Wells, 12 Mod. 420; Grant *v.* Astle, 2 Doug. 730; Empson *v.* Griffin, 11 Ad. & El. 187; Leach *v.* Thomas, 2 M. & W. 427; Gould *v.* Oliver, 2 Scott, N. C. 636; 2 M. & G. 208; Ayrey *v.* Fearnsides, 4 M. & W. 168; Lewin *v.* Edwards, 9 M. & W. 720; Day *v.* Robinson, 1 Ad. & El. 558; 2 N. & M. 670; Angle *v.* Alexander, 7 Bing. 119; Eddowes *v.* Hopkins, 1 Doug. 377; Reg. *v.* Virrier, 12 Ad. & El. 331, overruling Williams *v.* Breedon, 1 Bos. & Pul. 329; Burnet *v.* Wells, 12 Mod. 420; see, also, Union Turnpike Co. *v.* Jenkins, 1 Caines, 392; Hopkins *v.* Beedle, *Id.* 347; Lyle *v.* Clason, *Id.* 583; Livingston *v.* Rogers, *Id.* 587; Stafford *v.* Green, 1 Johns. 505; Cooper *v.* Bissell, 15 Johns. 318; Sayre *v.* Jewett, 12 Wend. 135; Addington *v.* Allen, 11 Wend. 374; Case *v.* Buckley, 15 Wend. 327; Yrisarri *v.* Clements, 3 Bing. 432; Neal *v.* Lewis, 2 Bay, 204; Hogg *v.* Wilson, 1 Nott. & McC. 216; Kennedy *v.* Lowry, 1 Binney, 397; Shaffer *v.* Kintzer, *Id.* 537; Paul *v.* Harden, 9 S. & R. 23; Smith *v.* Cleveland, 6 Metc. 332; Baker *v.* Sanderson, 3 Pick. 348; Cornwall *v.* Gould, 4 Pick. 444; Patten *v.* Gurney, 17 Mass. 182; Barnard *v.* Whiting, 7 Mass. 358; Barnes *v.* Hurd, 11 Mass. 57; Sullivan *v.* Holker, 15 Mass. 374; Clark *v.* Lamb, 6 Pick. 512; Kingsley *v.* Bill, 9 Mass. 198; Dryden *v.* Dryden, 9 Pick. 546; Hayter *v.* Moat, 2 M. & W. 56; Gregory *v.* Duke of Brunswick, 7 Sc. N. R. 972; Harker *v.* Orr, 10 Watts, 245; Ruth *v.* Kutz, 1 Watts, 489; Gosling *v.* Morgan, 32 Penn. St. 273; Stitzell *v.* Reynolds, 59 Penn. St. 488; Pemberton *v.* Colls, 16 Law Jour. Rep. Q. B. 403; 11 Jurist, 1011; Cook *v.* Cox, 3 M. & S. 110; Clement *v.* Fisher, 7 B. & Cr. 459; 1 M. & R. 281. A verdict supported by one count held good. (Marshall *v.* Gunter, 6 Rich. 419; Graves *v.* Waller, 19 Conn. 90; Bloom *v.* Bloom, 5 S. & R. 391; Hoag *v.* Hatch, 8 Monthly Law Rep. N. S. 686.)

[3] Mayne on Damages, 237; Bridges

§ 292. Where there is a misjoinder of several counts, and general damages are assessed, judgment will be arrested.[1] In cases of misjoinder of counts, the verdict may be taken for the plaintiff on the counts properly joined, and for the defendant on the other count or counts, or the plaintiff may enter a *nolle prosequi* as to the count or counts improperly joined.[2] Where there were two counts upon the same words, but published at different times, a general verdict for the plaintiff was upheld.[3] A general verdict on five counts held not responsive to either count.[4] A verdict that "the defendant spoke and published the words in the complaint specified" was upheld.[5] And so of a verdict that found "the defendant guilty of willful and malicious slander."[6] In an action for libel there were eight special pleas of justification, and issue thereon; the jury found for the plaintiff on three issues, and for the defendant on the residue of the pleas; the verdict was held void because it did not assess the plaintiff's damages on the issues found for him.[7] A plea of justification in an action for a libel contained three material allegations, as to one of which the jury expressed themselves of opinion that the proof failed. The judge told them that to warrant a finding in favor of the defendant, they must be satisfied that all three of the allegations were substantially made out. The jury, after two hours' deliberation, re-

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v. Horner, Carthew, 230; Nicholls *v.* Reeve, 1 Freeman, 83; Cheetham *v.* Tillotson, 5 Johns. 430; Griffith *v.* Lewis, 8 Q. B. 844; 7 Adol. & El. N. S. 67; Alfred *v.* Farlow, 8 Q. B. 854; Lloyd *v.* Morris, Willes, 443; Hughes *v.* Rees, 4 M. & W. 204; Campbell *v.* Lewis, 3 Barn. & Ald. 392; Edwards *v.* Reynolds, Hill & Denio Sup. 53; Sherry *v.* Frecking, 4 Duer, 452; Holmes *v.* Jones, 20 N. Y. St. Rep. 176.

[1] Hemming *v.* Elliott, 5 Cent. Rep. 592; 66 Md. 197.

[2] Corner *v.* Shew, 3 M. & W. 350; Kitchenman *v.* Skeel, 3 Ex. 49; Kightley *v.* Birch, 2 M. & S. 540.

[3] Bradley *v.* Kennedy, 2 G. Greene, 231.

[4] Cock *v.* Weatherby, 5 S. & M. 333.

[5] Carlock *v.* Spencer, 2 Eng. (7 Ark.) 12.

[6] Benaway *v.* Conyne, 3 Chand. 214; and see Harding *v.* Brooks, 5 Pick. 244; Scott *v.* Cook, 1 Duvall, 314.

[7] Clement *v.* Lewis, 3 B. & B. 297; s. c. Lewis *v.* Clement, 3 B. & A. 702.

turned a verdict for the defendant upon that plea. The court refused to set it aside.[1]

§ 293. As the amount of damages in an action for slander or libel is always a subject for the exercise of the sound discretion of the jury, who may give more or less according to their conclusions from the whole case respecting the motives of the publisher,[2] a verdict in such an action will not be set aside for excessive damages unless there is some suspicion of unfair dealing,[3] or "unless the case be such as to furnish evidence of prejudice, partiality or corruption on the part of the jury."[4] The case must be very gross, and the damages enormous, to justify ordering a new trial on a question of damages.[5] A new trial

[1] Napier *v.* Daniell, 3 Sc. 417; 2 Hodges, 187; 3 Bing. N. C. 77. Where a plaintiff is entitled as against the defendant to be relieved from a verdict obtained against him, the court will not abstain from interfering on the ground of the lien of the plaintiff's attorney for his costs. (Symons *v.* Blake, 2 C. M. & R. 416.)

[2] Davis *v.* Davis, 2 N. & M. 81; Trabue *v.* Mays, 3 Dana, 138; Heath *v.* Hubbell, 6 Daly, 183, $7,000; Blunt *v.* Mason, malicious prosecution, $2,000, 3 Mason, 102; Chambers *v.* Robinson, 1 Strange, 691, $5,000; Wiggin *v.* Coffin, 3 Story, 1, $1,500. *Semble* in Illinois, the Supreme Court will not reverse a judgment of the Circuit Court because the damages are excessive. (City of Joliet *v.* Weston, 123 Ill. 641; and in Georgia see Brown *v.* Autrey, 78 Ga. 753.) Reversal for excessive damages in an action for injuries. (Coppers *v.* N. Y. C. R. R. 48 Hun, 292.) Appellate Court cannot fix the amount of damages. (Kennon *v.* Gilmer, 131 U. S. 22.)

[3] Mayson *v.* Sheppard, 12 Rich. Law (S. Car.) 254; and see Whyte *v.* Young, A'Beckett's Reserved Judgments, 68; Gilbert *v.* Burtenshaw, 1 Cowper, 230.

[4] Lawyer *v.* Smith, 1 Denio, 207; Hurtin *v.* Hopkins, 9 Johns. 36; Jarvis *v.* Hatheway, 3 Johns. 180; Rundell *v.* Butler, 10 Wend. 119; Bailey *v.* Dean, 5 Barb. 297; Spencer *v.* McMasters, 16 Ill. 405.

[5] Tillotson *v.* Cheetham, 2 Johns. 63, $1,400; Coleman *v.* Southwick, 9 Johns. 45; Southwick *v.* Stevens, 10 Johns. 443; Root *v.* King, 7 Cow. 613; Moody *v.* Baker, 5 Cow. 351; Cole *v.* Perry, 8 Cow. 214; Ostrom *v.* Calkins, 5 Wend. 263; Douglas *v.* Tousey, 2 Wend. 352; Cook *v.* Hill, 3 Sandf. 341; Riley *v.* Nugent, 1 A. K. Marsh, 431; Ryckman *v.* Parkins, 9 Wend. 470. The court refused to grant a new trial for excessive damages where the amounts were severally $1,000 (Bell *v.* Howard, 4 Litt. 117); $300, charge horse stealing (Faulkner *v* Wilcox, 2 Litt. 369); $2,736, charge perjury (Sanders *v.* Johnson, 6 Blackf. 51); $500, charge horse stealing (Teagle *v.* Deboy, 8 Blackf. 134); £750, charge against a minister of the gospel (Highmore *v.* Harrington, 3 C. B. N. S. 142); £350 (Wakley *v.* Cooke, 4 Ex. 511); $334 (Ross *v.* Ross, 5 B. Monr. 20); $212 (St. Martin *v.* Desnoyer, 1 Minn. 156); $4,000 (Litton *v.* Young, 2 Metc. [Ky.] 558); $15,000 (Trumbull *v.* Gibbons, N. Y. Judicial Repository, 1); $5,000, charge want of chastity (Buckley *v.* Knapp, 48 Mo. 152); $10,000 (Fry *v.* Bennett, 4 Duer, 247); £1,000 (Gfroerer *v.* Hoff-

was granted on payment of costs, and under peculiar circumstances, where the verdict was £150,[1] and so where the damages were $5,000.[2] There is nothing to forbid the granting a new trial, in a proper case, for insufficient damages; but the granting a new trial for insufficient damages is of rare occurrence. Where the plaintiff was a minister of the gospel, and the damages only one farthing, the court refused a new trial.[3] The court may order a new trial unless the plaintiff consents to reduce the damages. Thus where the damages were $600, the court ordered a new trial, unless the plaintiff would consent to reduce them to $200.[4]

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man, 15 Up. Can. Q. B. R. 441); $709 (Shute *v.* Barrett, 7 Pick. 82); $510 (Oakes *v.* Barrett, 7 Pick. 82); (Townsend *v.* Hughes, 2 Mod. 150); £4,000 (Roe *v.* Hawkes, 1 Lev. 97); $3,500 (McDougal *v.* Sharp, 1 City Hall Recorder, 154); $1,400 (Bodwell *v.* Osgood, 3 Pick. 379); and see Baker *v.* Briggs, 8 Pick 122; Sargent *v.* ——, 5 Cow. 106; Mayne on Damages, 347; Chambers *v.* Caulfield, 6 East, 256; Hewlett *v.* Cruchley, 5 Taunt. 277; Coffin *v.* Coffin, 4 Mass. 1; Neal *v.* Lewis, 2 Bay, 204; Edgar *v.* Newell, 24 Up. Can. Q. B. R. 215; Myers *v.* Curry, *Id.* 470; Treanor *v.* Donahue, 9 Cush. 228; Wood *v.* Gunston, Style, 465; referred to Clapp *v.* Hudson River R. R. Co. 19 Barb. 465, and said to be the first case in which a new trial was granted for excessive damages; Bruton *v.* Downes, 1 Fost & F. 668.

[1] Swan *v.* Clelland, 13 Up. Can. Q. B. Rep. 335; and the plaintiff having died since the verdict was rendered, defendant was put under terms not to assign death of plaintiff as error, if on new trial the verdict was for the plaintiff. (See § 299, *post.*) New trial not ordered where, pending appeal from judgment, plaintiff died. (Spooner *v.* Keeler, 51 N. Y. 527.)

[2] Nettles *v.* Harrison, 2 McCord, 230, $5,000. New trial where damages $2,500 (Freeman *v.* Tinsley, 50 Ill. 497, $2,500); so where damages $4,000 (Windsor *v.* Oliver, 41 Ga. 538.)

[3] Kelly *v.* Sherlock, Law Rep. 1 Q. B. 686; and see Mears *v.* Griffin, 2 Sc. N. R. 15; Irwin *v.* Cook, 24 Texas, 244; Wavle *v.* Wavle, 9 Hun, 125; Alges *v.* Duncan, 39 N. Y. 313; McDonald *v.* Walker, 40 N. Y. 551. In Forsdike *v.* Stone (Law Rep. 3 C. P. 607), the charge was that the female plaintiff had been guilty of adultery, and the damages were one shilling; a new trial was refused, and it was said that no new trial would be granted for insufficient damages, unless there had been a mistake in point of law on the part of the presiding judge, or a mistake in the calculation of figures, or misconduct by the jury. In Ohio (Code, § 298), it is provided: A new trial shall not be granted on account of smallness of damages in an action for injury to the person or reputation. New trial because damages too small refused. (Rendall *v.* Hayward, 5 Bing. N. C. 424; Ld. Gower *v.* Heath, Barnes' Notes, 445; Hayward *v.* Newton, 2 Stra. 940; Atkins *v.* Thornton, Draper's Up. Can. Rep. 239.) New trial granted because damages too small, *and because* error in charge. (Kenney *v.* McLaughlin, 71 Mass. 3; and see Falvey *v.* Stanford, Law Rep. 10 Q. B. 54, where the damages were one farthing, and a new trial granted.)

[4] Potter *v.* Thompson, 22 Barb. 87; Cook *v.* Cook, 36 Up. Can. Q. B. Rep. 583. Such a proceeding held improper. (Cassin *v.* Delany, 38 N.

§ 294. A new trial will not be granted because a verdict for defendant should have been for plaintiff with nominal damages.[1] A new trial will be granted to admit newly discovered evidence to support a defense of not guilty, but not to support a justification.[2] A new trial was refused where since the verdict for the plaintiff he had been convicted, partly on the evidence of the defendant, of the offense charged.[3] A new trial was refused where a witness for the plaintiff had since the trial been convicted of perjury.[4] Where plaintiff obtained a verdict for one shilling damages, in consequence, as he supposed, of the admission of improper evidence, it was held that having recovered a verdict, he could not insist on his objections to evidence, and a new trial was refused.[5]

§ 295. Actions for slander and libel are in the nature of penal actions, and though the jury find for the defendant against the weight of evidence, a new trial for such a

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Y. 178; 6 Trans. App. 202; 6 Abb. Pr. R. N. S. 1; Moffet *v.* Sackett, 18 N. Y. 522; Whitehead *v.* Kennedy, 69 N. Y. 462, and note; 8 Civ. Pro. Rep. 4.) On motion for new trial because damages excessive, the court, *on plaintiff's consent alone*, may deny motion unless damages reduced. (Belt *v.* Lawes, 12 Q. B. D. 356.) Notwithstanding what was said in Cassin *v.* Delany, the Court of Appeals, in Holmes *v.* Jones, 20 N. Y. St. Rep. 176, ordered a new trial unless damages reduced from $5,000 to $2,000. The court refused a new trial, but reduced the amount of damages. (Gostling *v.* Brooks, 2 Fost. & F. 76; and see Johnston *v.* The Athenæum, 2 Appleton's Law of Literature, 452; Upham *v.* Dickinson, 50 Ill. 97.) In the case of Attorney General of Jersey *v.* Ennis, an action of slander mentioned in a note to Warren's Law Studies, the plaintiff appealed to the privy council from a verdict for the defendant given by the Royal Court at Jersey; the privy council not only set aside the verdict, but ordered the verdict to be entered for the plaintiff, with £50 damages.

[1] Patton *v.* Hamilton, 12 Ind. 256; Rundell *v.* Butler, 10 Wend. 119. See, however, Levi *v.* Milne, 4 Bing. 195. Courts interfere with verdict to prevent manifest injustice. (Moore *v.* Mank, 3 Bradw. [Ill.] 114.)

[2] Beers *v.* Root, 9 Johns. 264.

[3] Symons *v.* Blake, 2 C. M. & R. 416; 4 Dowl. Pr. Cas. 263; 1 Gale, 182.

[4] Eakins *v.* Evans, 3 Up. Can. Q. B. Rep. O. S. 383.

[5] Rogers *v.* Munns, 25 Up. Can. Q. B. Rep. 153; and see Smith *v.* Kerr, 1 Barb. 155; Case *v.* Marks, 20 Conn. 248. Where plaintiff had a verdict for five shillings, a new trial was granted, the court recommending a *stet processus*. (Shaver *v.* Linton, 22 Up. Can. Q. B. R. 177.) In Hogle *v.* Hogle (16 Up. Can. Q. B. R. 518), the plaintiff had a verdict for fifty shillings; the court above held that the declaration did not disclose a cause of action, refused a new trial to give defendant his costs, but arrested the judgment.

cause is never (seldom) granted.[1] To warrant a new trial on the ground that the verdict is against evidence, it must be a very clear case.[2] A new trial was granted because the language published did not warrant the innuendoes;[3] and so where the innuendo was disproved.[4]

§ 296. In New York, if the plaintiff recovers less than $50 damages, he can recover no more costs or disbursements than damages.[5] The defendant may, at any time before verdict, offer to allow judgment to be taken against him for a certain sum with costs; the non-acceptance by plaintiff of such an offer will subject him to costs subsequent to its service, unless he recover a more favorable judgment.[6] In England, if the damages in an action for slanderous words are less than forty shillings, the plaintiff, by Statute 21 James I, recovers no more costs than damages; the statute was held not to apply to actions where the special damages are the gist of the action, nor to slander of title nor to libel.[7]

[1] *Ex parte* Baily, 2 Cow. 479; Hurtin *v.* Hopkins, 9 Johns. 36; and see Hurtert *v.* Weins, 27 Iowa, 134. It is only on the very strongest grounds a verdict for defendant will be set aside as against evidence on a question of fair comment. (Odger *v.* Mortimer, 28 Law Times, N. S. 472; Pearson *v.* Stingo, 7 Vict. Law R. L. 9.)

[2] Root *v.* King, 7 Cow. 613; affirmed 4 Wend. 113; Paddock *v.* Salisbury, 2 Cow. 811; Kelly *v.* Partington, 4 B. & Ad. 700; Fisher *v.* Clement, 10 B. & Cr. 472; Blackburn *v.* Blackburn, 4 Bing. 395; 1 M. & P. 33; Broome *v.* Gosden, 1 C. B. 728; Hunt *v.* Bennett, 4 E. D. Smith, 657.

[3] Yrisarri *v.* Clement, 3 Bing. 432.

[4] Johnston *v.* McDonald, 2 Up. Can. Q. B. R. 209. There cannot be a new trial upon one of several issues. (Morrison *v.* Harmer, 4 Scott, 530.) On motion for a new trial on the ground that the verdict is contrary to the evidence, the court is to pass upon the effect of the language published. (Donaghue *v.* Gaffy, 54 Conn. 257.)

[5] Code Civ. Pro. § 3228; see § 289, *ante*.

[6] Code Civ. Pro. § 738.

[7] As to costs in the courts of England, Skelton *v.* Seward, 1 Dowl. 411; Skinner *v.* Shoppee, 6 Bing. N. C. 131; Simpson *v.* Hurdiss, 2 M. & W. 84; 5 Dowl. 304; Foster *v.* Pointer, 8 M. & W. 395; 1 Dowl. 28; 9 C. & P. 718; Empson *v.* Fairfax, 3 Nev. & P. 385; Dadd *v.* Crease, 2 Cr. & M. 223; 4 Tyrw. 74; s. c. Dann *v.* Crease, 2 Dowl. 269; Lafone *v.* Smith, 4 Hurl. & Nor. 158; Savile *v.* Jardine, 2 H. Black. 531; Halford *v.* Smith, 4 East, 567; Richards *v.* Cohen, 1 Dowl. 533; Goodall *v.* Ensell, 3 Dowl. Pr. Cas. 743; Grenfell *v.* Pierson, 1 Dowl. Pr. Cas. 406; Turner *v.* Horton, Willes, 438; Andrews *v.* Thornton, 8 Bing. 431; Forbes *v.* Gregory, 1 Cr. & M. 435; 1 Dowl. 679; Harrison *v.* Bush, 5 E. & B. 344; Biddulph *v.* Chamberlayne, 17 Q. B. 351; Kelly *v.* Partington, 5 B. & Ad. 645; 2 Nev. & M. 460; Prynne *v.* Brown, 1 Dowl. Pr. Cas. N. S. 680; 2 Stark. Sland. 113;

§ 296*a*. Where a plaintiff in an action for slander or libel has had an opportunity of trying the action upon its merits, and has consented to a nonsuit, and afterwards brings a second action for substantially the same cause, leaving the costs of the former action unpaid, the court may stay the proceedings in the second action until the costs of the first action are paid,[1] and this, although the second action is in a different court from that in which the first action was brought.[2]

Stat. 58 Geo. III, ch 30; and by statute 3 and 4 Vict. ch. 24, § 2, on a certificate by the judge that the injury was willful and malicious, the plaintiff may recover costs, although the verdict is for less than forty shillings; as to this see Forsdike *v.* Stone, Law Rep. 3 C. P. 607; and see 30 and 31 Vict. ch. 142; Ings *v.* London and So. West. R. R. Law Rep. 4 C. P. 17; Gray *v.* West, Law Rep. 4 Q. B. 175; Sampson *v.* Mackay, *Id.* 643; Marshall *v.* Martin, Law Rep. 5 Q. B. 239. In Dicks *v.* Brooks (15 Ch. Div. 41), reference is made to a case of slander or libel where plaintiff had a verdict for one farthing and costs were given to defendant. As to costs in Vermont, see Nichols *v.* Packard, 16 Vt. 147. In Indiana, see Shimer *v.* Bronnenburg, 18 Ind. 363. In Arkansas, Hill *v.* Patterson, Hemp. 173.

[1] Hoare *v.* Dickson, 7 C. B. 164; 15 Law Jour. N. S. 158, C. P.

[2] Prowse *v.* Loxdale, 3 B. & S. 896. After judgment for defendant and writ of error by plaintiff, the defendant was discharged as a bankrupt; on motion plaintiff was allowed to discontinue without costs. (Labrow *v.* Worman, 5 Hill, 373, citing Hart *v.* Storey, 1 Johns. 143; Case *v.* Belknap, 5 Cow. 422; Honeywell *v.* Burns, 8 *Id.* 121.) The plaintiff may withdraw a juror. The effect of withdrawing a juror, according to the English practice, is that no new action for the same cause can be maintained. (Strauss *v.* Francis, 4 F. & F. 939.)

In Dawkins *v.* Prince Edwards, &c. (1 Q. B. D. 499), the action was for an alleged conspiracy to make false statements respecting plaintiff, an army officer, on half pay. On defendant's motion it appearing that the action was for acts done by defendant in performance of his duty as a member of a Military Court of Inquiry, the action was stayed as an abuse of the process of the court, and see Castro *v.* Murray, L. R. 10 Ex. 213.

CHAPTER XII.

PARTIES.

Question as to parties anticipated—Action by alien—Outlaw—Rebel—Executors or administrators—Married woman—Husband and wife—Partners—General rule as to joinder—Action against husband and wife—Contribution.

§ 297. The questions who may sue and who may be sued, of course, generally depend upon the prior questions of rights and liabilities, and, therefore, to some extent, the question of parties has been anticipated.[1] Subject to any exceptions which have been or may be mentioned, the rules as to parties which prevail in actions for torts generally apply to the actions for slander and libel.[2]

§ 298. It was held that an alien friend, although residing in a foreign country, might maintain an action for a libel published in England.[3] Where the plaintiff in an action for libel was at the commencement of the action an outlaw, of which the defendant was ignorant until

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[1] *Ante*, §§ 115, 119, notes: and see *post*, note 6, p. 533. The proprietor of a newspaper may be sued for what appears in his paper without joining the author of the article as defendant. (Ludwig *v.* Cramer, 53 Wis. 193.) Each person injured by the same libel has a separate cause of action and must sue alone. (Robinett *v.* McDonald, 65 Cal. 611.) An action for slander cannot be maintained against a mutual aid association. (Gilbert *v.* Chrystal Fountain Lodge, 4 So. East. Rep. 905 [Ga.].)

[2] In New York, actions (with a few exceptions) must be in the name of the real party in interest, therefore an answer that plaintiff is not the real party in interest, but the action is prosecuted by some one else in plaintiff's name, was held to be relevant. (Moody *v.* Libbey, 1 Abb. N. C. 154; see § 303, *post*.)

[3] Pisani *v.* Lawson, 6 Bing. N. C. 90; 8 Dowl. 57; 8 Scott, 182: see Burnside *v.* Matthews, 54 N. Y. 78.

after notice of trial, the court after the trial stayed the proceedings, but removed the stay on the outlawry being reversed.[1] In an unreported case in New York (Cummings *v.* Bennett), it being shown that the plaintiff in an action for libel was an unpardoned rebel, the court at special term made an order dismissing the complaint, but the general term reversed the order. In an action for words imputing murder, the court allowed the defendant until the next term to plead, upon the ground that the plaintiff was to be tried for the alleged murder on an indictment then pending.[2]

§ 299. By the common law, actions of tort die with the person, "all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender,"[3] and this rule applies to actions for slander[4] and libel, except in those States where a different rule is prescribed by statute. In New York, certain actions of tort, except slander and libel, survive.[5] But the death of a plaintiff after a judg-

[1] Somers *v.* Holt, 8 Dowl. Pr. Cas. 506; see Reg. *v.* Lowe, 8 Ex. 697. In an action for slander of an infant, the father having been admitted to sue as *prochein amy*, and afterwards it appearing that he had taken the benefit of the insolvent debtor's act, and had since had no occupation, the court, in the absence of anything to satisfy them that no fitter person could be obtained, vacated the appointment, with leave to move to reappoint the father, or substitute some other person. (Duckett *v.* Satchwell, 1 Dowl. & L. 980; 13 Law J. N. S. Exch. 224; 8 Jur. 408.)

[2] Sibson *v.* Nivin, Barnes' Notes, 224.

[3] Mansfield, J., Humbly *v.* Trott, 1 Cowp. 375.

[4] 1 Wm. Saund, 316 *a*, 6th ed.; Nettleton *v.* Dinehart, 5 Cush. 543; Walters *v.* Nettleton, 5 Cush. 544; Walford on Parties, 1392, 1449; and so in Arkansas and Florida, see Jones *v.* Townsend, 23 Fla. 355; Pennsylvania, Struthers *v.* Peacock, 11 Phil. Rep. 287. At common law, where there is judgment against the defendant, and he appeals, and after the appeal the defendant dies, the judgment dies with him. (Faith *v.* Carpenter, 33 Ga. 79.)

[5] 2 Rev. Stat. of N. Y. 447, §§ 1, 2. By statutes in Ohio and Maryland, the right of action for slander or libel does not abate by death of plaintiff. (Alpin *v.* Morton, 21 Ohio, N. S. 536.) *Contra*, in Massachusetts. (Cummings *v.* Bird, 115 Mass. 346.) And *semble*, Arkansas. In Ireland *v.* Champneys (4 Taunt. 884) an action for libel, after interlocutory judgment and writ of inquiry executed, the plaintiff died; held that final judgment could not be entered, the suit having abated by the plaintiff's death. (See Kramer *v.* Waymark, Law Rep. 1 Exch. 243.) After a judgment for defendant in an action for libel, and a reversal of that judgment in the Court of Appeals, and new trial ordered, the defendant died; held that plaintiff could not revive the action against defendant's

ment in his favor, and pending an appeal from the judgment, does not abate the appeal, and the personal representatives of the deceased may be substituted as respondents.[1] By statute in Maine, actions for slander and libel survive, and may be maintained in the name of the executor or administrator.[2] An action by partners is not abated by the death of one partner;[3] the death of the plaintiff, in an action for slander of title does not abate the action.[4] In Wisconsin the right of a woman to maintain an action for slander, commenced by her before marriage, is not abated by the death of her husband or by her divorce from him.[5] A right of action for slander or libel is not assignable, and does not pass under a general assignment to a receiver by a judgment creditor or to an assignee in bankruptcy.[6]

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representatives. (Moore *v.* Bennett, 65 Barb. 338; and see Phillips *v.* Homfray, 24 Chan. Div. 439.) The N. Y. Code Civ. Pro. 764, provides that after verdict, report or decision, in action to recover damages for a personal injury, which includes libel, slander and malicious prosecution (same Code, § 3343), the action shall not abate by the death of a party. (See Smith *v.* Lynch, 12 N. Y. Civ. Pro. Rep. 348; *Re* Clark, *Id.* 383; Comstock *v.* Dodge, 43 How. Pr. R. 97; Atlantic Dock Co. *v.* The Mayor, 53 N. Y. 64; Spooner *v.* Keeler, 51 N. Y. 527; Corbett *v.* 23d St. R. R. Co. 114 N. Y. 579); and as to stipulating not to insist upon death as abating the action; (Cox *v.* N. Y. Cent. R. R., 63 N. Y. 420; Ames *v.* Webber, 10 Wend. 376; 11 *Id.* 186; Griffith *v.* Williams, 1 Cromp. & J. 47; Palmer *v.* Cohen, 2 B. & Ad. 966; *ante*, note 1. p. 525.)

[1] This was done in Sanford *v.* Bennett, 24 N. Y. 20. If judgment for plaintiff is reversed, after death of plaintiff, no new trial will be ordered. (Spooner *v.* Keeler, 51 N. Y. 528; and as to death of plaintiff, see Miller *v.* Gunn, 7 How. Pr. R. 159.

[2] Nutting *v.* Goodridge, 46 Maine, 82. In Iowa, by statute, an action of libel is not abated by the death of the defendant. (Carson *v.* McFadden, 10 Iowa [2 With.], 91.) Death of a defendant after an appeal, held to abate the appeal. (Long *v.* Hitchcock, 3 Hun, 274.) If after verdict and before judgment the defendant is adjudged bankrupt, the plaintiff may, nevertheless, continue the action. (Zimmer *v.* Schleehauf, 115 Mass. 52.)

[3] Shale *v.* Swartz, 35 Hun, 622.

[4] Hatchard *v.* Miege, 18 Q. B. D. 771; 36 Alb. L. J. 90, 132. The action is for injury to property. The right of action for special damage to property always survives. (Finley *v.* Chirney, 20 Q. B. D. 494.)

[5] Gibson *v.* Gibson, 46 Wis. 449.

[6] Hudson *v.* Plets. 11 Paige, 180; and see Dowling *v.* Browne, 4 Irish Law Rep. 265; Benson *v.* Flowers, Sir W. Jones, 215; Howard *v.* Crowther, 8 M. & W. 601; Drake *v.* Beckham, 11 M. & W. 315; overruling S. C. 8 M. & W. 846. In Indiana a cause of action for slander was held to constitute the plaintiff a creditor of the defendant, so as to render a conveyance made to defeat any judgment that might be obtained for such cause of action fraudulent. (Shean *v.* Shay, 42 Ind. 375.)

§ 300. By statute in New York, Michigan, and elsewhere, a married woman may sue alone and without her husband, for slander or libel;[1] and so, under certain conditions, in Pennsylvania,[2] and in Scotland.[3] It has been held that the New York statute does not authorize a suit for slander by a wife against her husband.[4] And it was held in Pennsylvania, that a married woman could not maintain an action for slander published at the instance of her husband.[5]

§ 301. Independently of any statutory provision for language actionable *per se*, published concerning a married woman, or concerning a woman who afterwards marries, the action should be brought in the name of the husband and wife.[6] In such a case the damage is to both plaintiffs, and the right of action in case of the death of

[1] Laws of N. Y. 1860, ch. 90; *Id.* 1862, ch. 172; Leonard *v.* Pope, 27 Mich. 145; Chicago R. R. Co. *v.* Dunn, 52 Ill. 260; Hawver *v.* Hawver, 78 Ill. 412. And after an order for protection. (Ramsden *v.* Brearly, Law Rep. 10 Q. B. 147; *ante*, § 153.) A statute of Delaware (17 Laws. c. 611), empowered a married woman, living apart from her husband to sue in her own name for personal wrongs. held not to empower her to maintain an action for a libel published before the passage of that act. (Woods *v.* Vernon, 12 Atlantic Rep. 656 [Del.].)

[2] Rangler *v.* Hummell. 37 Penn. St. R. 130. In Pennsylvania, by statute, a husband is not liable for the tort of his wife. (Kuklence *v.* Vocht, 119 Penn. St. 365.)

[3] Ewing *v.* Cullen, Boyd Kinnear's Dig. H. L. Cas. 188.

[4] Freethy *v.* Freethy, 42 Barb. 641; Alward *v.* Alward, 15 N. Y Civ Pro. Rep. 151. It is doubtful in Michigan whether or not a wife can sue her husband. Champlin, J., in Smith *v.* Smith (41 No. West. Rep. 500), says: "We are not prepared to decide that a married woman may not maintain an action of libel against her husband." As to the right of a wife to protection against slander by her husband, see Deut. xxii, 13. 22. A wife cannot institute criminal proceedings against her husband for libel. (*Ex parte*, Reg. *v.* Ld. Mayor of London, 16 Q. B. D. 772.)

[5] Tibbs *v.* Brown, 2 Grant's Cas. (Penn.) 39.

[6] 1 Stark. Slan. 349; Ebersoll *v.* Krug, 3 Binney, 528; Newton *v.* Rowe, 8 Sc. N. R. 26; Dengate *v.* Gardiner, 4 M. & W. 5; Grove *v.* Hart, Sayre, 33; Baldwin *v.* Flower, 3 Mod. 120; Long *v.* Long, 4 Barr. 29; Gibson *v.* Gibson, 43 Wis. 23. But in an action by husband and wife, counts for publications before plaintiff's marriage cannot be joined with counts for publications, subsequent to the marriage. (Hemming *v.* Elliott, 5 Cent. Rep. 492; s. c. Hemming *v.* Elliott, 66 Md. 197.) A husband is not liable criminally for a libel by his wife in which he was in no wise concerned. (Mills *v.* The State, 18 Neb. 575.) In Kansas he is not liable civilly under such circumstances. (Norris *v* Corkill, 32 Kans. 409.) For words of a married woman imputing unchastity before marriage, the husband, under the Code of Maryland, must sue alone. (Hemming *v.* Elliott, 66 Md. 197.)

the husband survives to the wife; but if the wife dies before verdict, the action abates.[1] For language concerning a married woman, but actionable only because of special damage to the husband, the husband must sue alone.[2] These rules are not affected by the fact that the husband and wife live apart under a deed of separation.[3] Where an action was brought by a wife living apart from her husband under articles of separation, in the names of her husband and herself, for defamatory words spoken of her, it was held that a release of the cause of action executed by the husband was a bar to the suit, although in the articles of separation the husband had covenanted that suits might be brought in the joint names of himself and his wife, for any injury to the person or character of the wife.[4] For a charge of a joint larceny by husband and wife, *semble* the husband should sue alone, because the wife is *prima facie* not liable criminally for a larceny committed in the presence of her husband.[5]

§ 302. Where the language published concerns both husband and wife, the husband may sue alone for the injury to him, and the husband and wife may sue jointly for the injury to the wife.[6] In an action by husband and

[1] Stroop *v.* Swarts, 12 S. & R. 76; and see Smith *v.* Hixon, 3 T. R. 627. Case for words by husband and wife against defendants, husband and wife; pending the action the male defendant died, and his widow remarried. The court inclined that the writ abated, but took time to advise. (White *v.* Harwood, Style, 138; Viner's Abr. Baron and Feme, *A*, *a*.)

[2] Williams *v.* Holdredge, 22 Barb. 396; Gazynski *v.* Colburn, 11 Cush. 10; Grove *v.* Hart, Bull. N. P. 7; Savile *v.* Sweeney, 1 Nev. & M. 254; 4 B. & Adol. 514; Horton *v.* Byles, 1 Sid. 387; Long *v.* Long, 4 Barr. 29; 1 Stark. Slan. 350; Bash *v.* Sommer, 20 Penn. St. R. 159; Coleman *v.* Harcourt 1 Lev. 140; Klein *v.* Hentz, 2 Duer, 633.

[3] Beach *v.* Ranney, 2 Hill, 309.

[4] Beach *v.* Beach, 2 Hill, 260.

[5] Bash *v.* Sommer, 20 Penn. St. R. 159. And where the defendant charged plaintiff's wife with keeping a bawdy-house, it was held the husband might sue alone, as the words charged an indictable offense, for which, if true, the husband was liable to be punished. (Coward *v.* Wellington, 7 C. & P. 531.)

[6] Gazynski *v.* Colburn, 11 Cush. 10; Bash *v.* Sommer, 20 Penn. St. R. 159; Emington *v.* Gardiner, 1 Selw. N. P. 301: Smith *v.* Hobson, Style, 112; Ebersoll *v.* Krug, 3 Binney, 528; Hart *v.* Crow, 7 Blackf. 351; *ante*, note 2, p. 99. The court will not order such actions to be consolidated. (Anon., Selwyn N. P. 301; Swithin *v.*

wife, a plea that the plaintiffs were not man and wife at the time of the commencement of the action is a good plea in bar.[1] But it is not a defense to an action by husband and wife that the plaintiffs were not married at the time of the publication complained of.[2] Where the husband and wife are improperly united as plaintiffs, and there is no demurrer, the error is cured by verdict,[3] or by omitting to demur.[4]

§ 303. For language published concerning partners in the way of their trade, all the partners may join;[5] but if the language concerns and injuriously affects either partner

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Vincent, 2 Wils. 227; Subley *v.* Mott, Bull. N. P. 5.) In an action by a husband for words concerning his wife, in the *past tense*, a demurrer was allowed, because it did not appear that the words were published since the plaintiff's marriage. (Ray *v.* Wakefield, 1 Australian Jurist Rep. 162.) Now, by statute 15 & 16 Vict. ch. 40, in an action by husband and wife for injury to the wife, in respect of which she is necessarily joined as a coplaintiff, the husband may add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated. In case of the death of either plaintiff, such suit, so far as relates to the causes of action, if any, which do not survive, shall abate.

[1] Chantler *v.* Lindsey, 16 M. & W. 82; 4 Dowl. & L. 339.

[2] Spencer *v.* McMasters, 16 Ill. 405; and see Benaway *v.* Conyne, 3 Chand. 214. But in an action by husband and wife, for words imputing adultery to the wife, it was held necessary to aver that they were husband and wife at the time of the publication. (Ryan *v.* Madden, 12 Vt. 51.)

[3] Russel *v.* Corne, 1 Salk. 119; 2 Ld. Raym. 1031; Todd *v.* Redford, 11 Mod. 264; Lewis *v.* Babcock, 18 Johns. 443.

[4] Code of Civ. Pro. N. Y. § 499. This defect cannot be insisted upon under a demurrer that the complaint does not state a cause of action. (Eldridge *v.* Bell, 12 How. Pr. R. 547.) No action can be maintained for the price of libelous pictures. (Fores *v.* Jones, 4 Esp. 97.) A printer cannot recover for printing a libel. (Poplett *v.* Stockdale, Ry. & Moo. 337; Bull *v.* Chapman, 8 Ex. 444.) If a printer undertakes to print a book, and as the work proceeds finds the matter defamatory, he may decline to continue the work, and can recover for the part of the work which is not defamatory. (Clay *v.* Yates, 1 Hurl. & N. 73.) Nor could an action be maintained for breach of a contract to furnish manuscript of defamatory matter. (Gale *v.* Leckie, 2 Stark. R. 107.) Or for pirating a libelous book. (Stockdale *v.* Onwhyn, 5 B. & C. 173; see Campbell's Lives of the Chancellors, X, 255, reviewing the decision of Lord Eldon, who refused to protect the copyright of alleged libelous works; see § 183, *ante*.)

[5] Cook *v.* Batchelor, 3 B. &. P. 150; 2 East, 426; LeFanu *v.* Malcolmson, 1 Ho. of Lds. Cas. 637; 13 Law Times, 61; Forster *v.* Lawson, 3 Bing. 452; 11 Moore, 360; Brownl. Rediv. 81: Haythorn *v.* Lawson, 3 Car. & P. 196; Pechell *v.* Watson, 8 M. & W. 691; cited 6 H. & N. 133; 2 Wm. Saund. 117, 6th ed.; see note to § 118, and § 185, *ante*. In defamatory language of coproprietors of a newspaper, held a joint action would lie, without special damages. (Russell *v.* Webster, 23 Weekly Rep. 59.)

individually, he may sue alone.[1] The general rule is, that where the injury is several, each person injured must sue separately and alone; as if one say, "A and B. murdered C.," or "Either A. or B. murdered C.," A. and B. cannot maintain a joint action.[2]

§ 304. For a publication by a married woman of defamatory language, before or during coverture, the action must, in the absence of any statute to the contrary, be against her and her husband.[3] A husband and wife may

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[1] Taylor *v.* Church, 1 E. D. Smith, 279; Harrison *v.* Bevington, 8 Car. & P. 708; Robinson *v.* Marchant, 7 Q. B. 918; Fidler *v.* Delavan, 20 Wend. 57; Longman *v.* Pole, 1 M. & M. 223; Tait *v.* Culbertson, 57 Barb. 9; Noonan *v.* Orton, 32 Wis. 106; Rosenwald *v.* Hummerstein, 12 Daly, 377; Ludwig *v.* Cramer, 53 Wis. 193; and as to partners, see Atlantic Glass Co. *v.* Paulk, 83 Ala. 404.

[2] Smith *v.* Cooker, Cro. Car. 512; 10 Mod. 198. As to one action against several for one libel, see Harris *v.* Huntington, 2 Tyler, 147; Watts *v.* Fraser, 7 C. & P. 369; Miller *v.* Butler, 6 Cush. 71; Glass *v.* Stewart, 10 S. & R. 222; *ante*, note 1, p. 529. Under the rule of procedure in the courts of England, relating to actions by persons *not jointly* interested, several persons although not parties may unite in one action and hence their damages separately assessed. (See Booth *v.* Briscoe, 2 Q. B. D. 296.) And where after the commencement of an action against the publisher of a newspaper, it appeared that one G. and not the person sued was sole proprietor of the newspaper in question, the court, on plaintiff's motion, ordered G. to be brought in as a defendant. (Edwards *v.* Lowther, 45 L. J. 417, C. L.) This was under a rule of the English courts, and applicable only to those courts.

[3] Head *v.* Briscoe, 5 Car. & P. 484; and see *ante*, note 2, p. 99; Swithin *v.* Vincent, 2 Wils. 227; Burcher *v.* Orchard, Style, 349; 2 Wm. Saund. 117 *d*, 6th ed.; McQueen *v.* Fulgham, 27 Texas, 463; Hanson *v.* Hill, 53 Barb. 238; Hawk *v.* Harman, 5 Binney, 43; Horton *v.* Payne, 27 How. Pr. R. 374; Baker *v.* Young, 44 Ill. 42.

In Michigan the husband is not liable for a tort (defamation) by his wife, but he may be joined as a defendant. (Burt *v.* McBain, 29 Mich. 260.) And so in Massachusetts (McCarty *v.* DeBest, 120 Mass. 89); but the Ohio act of 1861, concerning the rights of married women, has not altered the rule that the husband is liable for the torts of the wife. (Fowler *v.* Chichester, 26 Ohio St. R. 9.) And in England, by statute 20 & 21 Vict. ch. 85, a woman judicially separated from her husband is considered a *feme sole* for the purposes of contracts, wrongs, and injuries, and suing and being sued in civil proceedings; and her husband is not liable for her contract or wrongful act or omission. (Statute 45 and 46 Vict. ch. 75.) Married woman's property act of 1882, provided for a married woman being sued alone, yet in England a husband may or must still be joined as a defendant in an action for a libel published by his wife. (Scroker *v.* Kuttenburg, 17 Q. B. D. 177, commented on 5 Gibson's Law Notes, 270); and such is the law in Pennsylvania. (Franklin's Appeal, 4 Cent. Rep. 323; Kuklence *v.* Vocht. 119 Penn. St. 365, and in Ohio Fowler *v.* Chichester, 26 Ohio St. 9.). Ch J. McAdam, in the City Court of New York, so early as May, 1884, in the case of McNicholl *v.* Kane, 2 City Court Rep.

be jointly sued for a joint publication of written defamatory matter.[1]

§ 305. In certain cases the plaintiff is entitled to elect *de melioribus damnis* (§ 119),[2] or as to which of several parties he will sue, but neither in such cases, nor in any other case can there be any contribution between the parties, it being a general rule of law that there is no contribution between wrongdoers.[3]

57, held that in an action for slander against a married woman the non-joinder of her husband as a defendant was a complete defense, and that view has been sustained by the Court of Appeals. (Fitzgerald *v.* Quann, 109 N. Y. 441; 11 Cent. Rep. 245; 16 N. Y. St. Rep. 395; affirming 33 Hun, 652; and Austin *v.* Bacon, 49 Hun, 386; 19 N. Y. St. Rep. 662; the case of Mangam *v.* Peck, 25 Week. Dig. 504; Lande *v.* Smith, 6 N. Y. Civ. Pro. Rep. 51, to the contrary overruled.

[1] Catterall *v.* Kenyon, 3 Q. B. 310; Keyworth *v.* Hill, 3 B. & Ald. 685.

[2] Where one publication is made the subject of two counts, with different innuendoes, and damages have been given separately on each count, both damages cannot be retained, but plaintiff may elect which he will retain. (Langdon *v.* Syme, 3 Vict. L. R. L. 30.)

[3] See Merryweather *v.* Nixon, 8 T. R. 186, and notes thereto, 2 Smith's Lead. Cas. and in addition Moscati *v.* Lawson, 7 C. & P. 32: Andrews *v.* Murray, 33 Barb. 334; citing Miller *v.* Fenton, 11 Paige, 18; Coventry *v.* Barton, 17 Johns. 142; Peck *v* Ellis, 2 Johns. Ch. 131; Pearson *v.* Skelton, 1 M. & W. 504; Hunt *v.* Lane, 9 Ind. 248; Minnis *v.* Johnson, 1 Duvall (Ky.) 171; Silvers *v.* Nerdlinger, 30 Ind. 52. No contract will be *implied* to indemnify a party against the consequences of an illegal act. *e. g.*, the publication of a libel. (Shackell *v.* Rosier, 3 Sc. 59; 2 Bing. N. C. 634; and see Armstrong *v.* Bartle, 5 LeRevue Legale, Quebec, Canada.) And *semble*, the proprietor of a newspaper convicted and fined for the publication of a libel in his paper, which libel was inserted without his knowledge or consent by the editor, has no right of action against the editor for the damages sustained through such conviction. (Colburn *v* Patmore, 1 C. M. & R. 83; 4 Tyrw. 677; Moscati *v.* Lawson, 7 C. & P. 32.) One cannot take security to be indemnified against the consequences of an illegal act to be done. (Domat Civ. Law, bk. iii, tit 4, § 1, div. viii; and the same book and title, § 5, div. i; and see Howe *v.* Buffalo & Erie R. R. 38 Barb. 124; St. John *v.* St. John's Church, 15 Barb. 346.) A promise to indemnify one for publishing a libel is void. (Arnold *v.* Clifford, 2 Sumner, 238; Atkins *v.* Johnson, 43 Vt. 78.) But an indemnity against the consequences of an illegal act already done is binding. (Griffiths *v.* Hardenburgh, 41 N. Y. 469, citing Stone *v.* Hooker, 9 Cow. 154; Doty *v.* Wilson, 14 Johns. 379; Kneeland *v.* Rogers, 2 Hall, 579) Stipulation by vendee of newspaper to pay "all of the outstanding liabilities" of the paper, does not include damages subsequently recovered against the vendor in an action for a libel in said newspaper, in an action pending when the stipulation was made. (Perrit *v.* King, 30 La. Ann. 1368; 13 Am. Rep. 240)

CHAPTER XIII.

PLEADING.—THE COMPLAINT.

General requisites of a complaint—Complaint for language concerning a person only—Inducement—Colloquium—Publication—Matter published—Innuendo—Special damage—Several counts—Supplemental complaint.[1]

§ 306. The complaint corresponds to the declaration in the common-law system of pleading. Its general requisites are that it must state (1) the name of the court in which the action is pending; (2) the names of the parties; (3) the county in which it is desired the issues shall be tried; (4) the facts which constitute the cause of action; (5) a demand of relief. It must be subscribed by the plaintiff, or his attorney, and may, at the option of the plaintiff, be verified. Of these several requisites we propose to consider in detail only the fourth—the statement of the facts which constitute a cause of action.[2]

§ 307. The statement of a cause of action must necessarily differ more or less according to the difference in the state of facts of each particular case. But there are certain allegations essential in every case to the sufficiency of such a statement; we shall show what are these allegations, and endeavor to explain the rules by which their sufficiency may be tested. We premise by observing that we address ourselves exclusively to the statement of a cause

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[1] Complaint for slander of title, see *ante*, page 291, n. 2.

[2] William Cullen Bryant quitted his profession of the law in disgust because a verdict in an action for slander (Bloss *v.* Tobey, 2 Pick. 320) was set aside on account of a defect in the complaint drawn by him.

of action for slander or libel *concerning the person.* Such a statement may be conveniently considered under the following heads: (1) The inducement;[1] (2) The colloquium; (3) The act of publication; (4) The statement of the defamatory matter published; (5) The innuendoes; (6) The damages.

§ 308. We attempted, in a previous chapter (Ch. vii), to explain (1) that the actionable quality of language was dependent upon its construction, and (2) how the construction may be affected by a variety of extrinsic circumstances. It is the office of the inducement to narrate the extrinsic circumstances which, coupled with the language published, affects its construction and renders it actionable; where standing alone and not thus explained, the language would appear either not to concern the plaintiff, or if concerning him not to affect him injuriously.[2] This being the office of the inducement, it follows that if the language published does not naturally and *per se* refer to the plaintiff, nor convey the meaning the plaintiff contends for, or if it is ambiguous or equivocal, and requires explanation by some extrinsic matter to show its relation to the plaintiff, and make it actionable, the complaint must allege, by way of inducement, the existence of such extrinsic matter[3]

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[1] Including a panegyric upon plaintiff's character, as to which see *post*, note 3, p. 543.

[2] "Inducement is the statement of the facts out of which the charge arises, or which are necessary or useful to make the charge intelligible." (Tindal, Ch. J., Taverner *v.* Little, 5 Bing. N. C. 678; *ante*, § 129.)

[3] Inducement is necessary where the language does not naturally and *per se* convey the meaning which the plaintiff would attribute to it, and where a reference to some extrinsic fact is necessary to explain it. (Dorsey *v.* Whipps, 8 Gill, 457; Fry *v.* Bennett, 5 Sandf. 54; Hall *v.* Blandy, 1 Y. & J. 480; Gosling *v.* Morgan, 32 Penn. St. R. 273; Galloway *v.* Courtney, 10 Rich. Law [S. Car.] 414; The State *v.* Neese, 2 Tayl. 270; Cannon *v.* Phillips, 2 Sneed [Tenn.] 185; Edgerly *v.* Swain, 32 N. Hamp. 478; Smith *v.* Gafford, 31 Ala. 54; Lumpkins *v.* Justice, 1 Smith [Ind.] 322.) Where the language is claimed to be *ironical*, it must be so alleged in the inducement. (Boydell *v.* Jones, 4 M. & W. 446; 7 Dowl. Pr. Cas. 210.) In slander the words stated in the declaration were, "Thou set fire to those buildings, and thou wilt never be easy till thou hast told it." There was no introductory averment that the houses had been feloniously burned. A rule for arresting the judgment was made

(§ 310, *post*); but where the language published is actionable *per se*, where there is no ambiguity, either in respect to the person whom the language concerns, or in respect to the actionable quality of the language, that in such cases no inducement is necessary.[1] Hence it will be perceived that inducement is not, in every case, essential to the sufficiency of a statement of a cause of action, but in those cases only where, without the facts contained in the inducement, the publication would not naturally and *per se* refer to the plaintiff nor convey the meaning the plaintiff contends for, nor be construed as actionable.[2]

§ 309. In England, the common-law procedure act has abrogated the necessity for any matter of inducement in order to show the defamatory meaning of the language

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absolute. (Rigby *v.* Heron, 1 Jur. 538.) A complaint on a charge that plaintiff had carried away a deposition taken before a justice of the peace, must show that the deposition was taken in a proceeding in which the justice had jurisdiction, otherwise carrying away the deposition would not be any criminal offense. (Ayres *v.* Covill, 18 Barb. 260.) Where, in an action for slander brought by an unmarried female, the plaintiff's petition alleged that the defendant had charged her with having given birth to a child, without any averments showing that the hearers understood that the language used conveyed a charge of bastardy, or imputed a want of chastity to the plaintiff, to which petition the defendant demurred, it was held that the demurrer should be sustained. (Wilson *v.* Beighler, 4 Iowa, 427.) A charge that plaintiff had "trapped three foxes," was, by the aid of inducement, made actionable. (Foulger *v.* Newcombe, Law Rep. 2 Ex. 327.)

[1] No inducement is necessary where (1) the language is *prima facie* actionable *per se*. (Dorsey *v.* Whipps, 8 Gill. 457; McGough *v.* Rhodes, 7 Eng. [Ark.] 625.) (2) Where the language, in its ordinary acceptation, imports a charge of crime. (Robinson *v.* Keyser, 2 Fost. [N. H.] 323; Bicker *v.* Potts, 12 Penn. St. R. 200; and see Smith *v.* Hamilton, 10 Rich. Law [S. Car.] 44; Goodrich *v.* Davis, 11 Metc. 473; Connick *v.* Wilson, 2 Kerr. [New Bruns.] 617.) As if the words impute a charge that the plaintiff burnt his barn with intent to defraud the insurers, it is not necessary to aver that the barn was insured, nor to prove that it was insured. (Case *v.* Buckley, 15 Wend. 327.) And generally it is not necessary to aver facts implied by the alleged defamatory language. (Royce *v.* Maloney, 58 Vt. 437.) If one say of J. S.: "He hath killed his cook," it need not be averred that J. S. had any cook. (Holt *v.* Taylor, Sty. 66; and see Billing *v.* Knight, 2 Bulst. 42.) "Thou hast forged the will of R."—it need not be averred that R. was dead, it is implied. (Dorrel *v.* Jay, Yent. 149.) "He hath robbed the Hockly butcher," it need not be averred there is any Hockly butcher, for if there is not, the fault is the greater. (Smith *v.* Williams, Comb. 247; see *post*, § 315, and *ante*, note 1, p 120.)

[2] Smith *v.* Ottendorfer, 3 N. Y. St. Rep. 187.

published, and enacts that the plaintiff may aver that the matter complained of was used in a defamatory sense, specifying such defamatory sense, without any prefatory averment to show how such matter was used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the matter set forth, with or without the alleged meaning, shows a cause of action, the declaration shall be sufficient.[1]

§ 310. In New York the Code of Civil Procedure of that State dispenses with the necessity of any inducement to show that the plaintiff is the person referred to (§ 316, *post*) by providing that "It is not necessary in an action for libel or slander to state in the complaint any extrinsic fact for the purpose of showing the application to the plaintiff of the defamatory matter, but the plaintiff may state generally that it was published or spoken concerning him, and if that allegation is controverted the plaintiff must establish it on the trial."[2] (*Post*, §§ 316, 323,

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[1] 15 & 16 Vict. ch. 76; Finlason's Com. Law Proc. Act. 137; see Hemming *v.* Gasson, 27 Law Jour. Q. B. 252; Cox *v.* Cooper, 9 Law Times, N. S. 329; Brembridge *v.* Latimer, 12 Weekly Rep. 878; Watkin *v.* Hall Law Rep. 4 Q. B. 42. The effect of the decisions appears to be that a declaration concerning one count with an innuendo, shall be taken as if there were two counts, one with the innuendo and one without it. In New Jersey no colloquium is necessary; the pleader may attach any meaning he pleases to the words published, and it is left to the jury to say whether the meaning is justified by the words and by the evidence. (Hand *v.* Winton, 38 N. J. 122.) And so in Canada. (Fitch *v.* Lemmon, 27 Up Can. Q. B. 273.) And where the declaration alleged the publication by defendant concerning plaintiff of the words, "Notice—All persons who have paid Mr. Bowers (plaintift), formerly of the Lutheran Church (innuendo that plaintiff was falsely pretending to be a Lutheran minister), money for funeral services, will confer a favor by handing their names to the editor." On demurrer, held that the words, with the innuendoes, were actionable, but the action would fail if the jury found the innuendo was not justified. (Bowers *v.* Hutchinson, 1 Oldbright [Nova Scotia], 679.) In a declaration for libel imputing to plaintiff, an attorney, dishonest acts in reference to a matter not in the way of his profession, with an innuendo that the language was of plaintiff in his character of attorney, on demurrer the declaration was held to disclose a cause of action, but that if the plaintiff failed on the trial to support the innuendo, his action would fail. (Warton *v.* Gearing, 1 Vict. Law Rep. L. 122.)

[2] Code of Civ. Pro. § 535.

375*a*.) This statute merely dispenses with the inducement to show the application of the language to the plaintiff; it does not dispense with the necessity of averments of extrinsic facts to show the meaning of ambiguous language. And in New York, where the language published is not defamatory on its face, and becomes so only by reference to extrinsic facts, the existence of those facts must be alleged in the complaint.[1]

§ 311. The matter of inducement, when necessary, is usually inserted prior to the statement of the matter published; but this, although the more orderly arrangement, is not essential; so that the necessary inducement is to be found in the complaint, its location seems immaterial.[2]

§ 312. Where there are several counts in the complaint, each count must be prefaced with appropriate matter of inducement; but where the inducement to one

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[1] Pike *v.* Van Wormer, 5 How. Pr. Rep. 171; 6 *Id.* 99; Dias *v.* Short, 16 *Id.* 322; Fry *v.* Bennett, 5 Sandf. 54; Blaisdell *v.* Raymond. 4 Abb. Pr. Rep. 446; Wallace *v.* Bennett, 1 Abb. N. C. 478; Hallock *v.* Miller, 2 Barb. 630; Carroll *v.* White, 33 Barb. 615; Ballock *v.* Koon, 9 Cow. 30; and in Massachusetts, the law of 1852, ch. 312, has not dispensed with the necessity of averring the facts which render actionable words not actionable *per se*. (Tebbett *v.* Goding, 9 Gray, 254; and see Sheridan *v.* Sheridan, 5 Atl. 494 [Vt]; Ramscar *v.* Gerry, 16 N. Y. St. Rep. 789.) Defendants posted upon plaintiff's premises boards and cards inscribed: "Waiting for Tom Gault's house-rent." for "several months due." The declaration charged defendants with meaning thereby to charge plaintiff with fraudulently withholding said rent. Held, the innuendo could not enlarge the real sense of the words, but if under the circumstances stated, what was alleged could be reasonably imputed to them, then the allegation of such meaning was strictly its proper function (Gault *v* Babbitt, 1 Bradw. [Ill.] 130.) An allegation that the purpose of the pub ication in applying the term "Crank" to plaintiff was "to impute to him sundry qualities, aims, and methods highly inconsistent with his usefulness as a lawyer, or as an author," is not an appropriate averment or innuendo that the word was used in a defamatory sense. (Walker *v.* Tribune Co. 29 Ired. Rep. 827.)

Where the language is not actionable upon its face inducement is necessary, as where the words were, "The investigations are not yet ended, but the chief owners believe they have been outrageously swindled." (Wilson *v.* Fitch, 41 Cal 363.)

No inducement necessary where the charge was that plaintiff had sold diseased meat for food. (Blumhardt *v.* Rohr, 17 Atl. Rep. 266.)

[2] Brittain *v* Allen, 2 Dev. 120; 3 *Id.* 167; Newell *v.* How, 31 Minn. 235; but see what is said Caldwell *v.* Raymond, 2 Abb. Pr. Rep. 193.

count is applicable to a subsequent count, it may be applied to such subsequent count by reference thereto and without repeating it.[1] In slander, the first count charged a trial, that plaintiff gave evidence, and that the words were spoken of and concerning the trial, &c.; and the third count charged that the words therein set forth were published of the plaintiff, and of and concerning the action tried as aforesaid, and of and concerning the evidence of the plaintiff given on the said trial as aforesaid. Held, that the third count was sufficient.[2]

§ 312 *a*. Where inducement is necessary, it should be stated in a traversable form.[3] Thus, where it was alleged, by way of inducement, that reports were in circulation about the plaintiff, imputing something disgraceful, to which the publication referred, it was held insufficient, and that the reports themselves should have been set forth.[4] And where the alleged libel was the publication of a notice that the plaintiff had married E. E., and the inducement relied upon as making the publication actionable was that E. E. was a common prostitute, but the complaint did not allege this fact otherwise than as follows: "Married, J. W. C." (plaintiff meaning) "to E. E." (meaning a public prostitute known by that name), "that E. E. is a public prostitute, and well known to be so," the complaint was, on demurrer, held insufficient.[5]

§ 313. Where the inducement is essential to the sufficiency of the statement of the cause of action, and where, without the facts stated as inducement, no cause of action

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[1] Loomis *v.* Swick, 3 Wend. 205; Abendroth *v.* Boardley, 27 Wis. 555; and see Tindall *v.* Moore, 2 Wilson, 114.

[2] Crookshank *v.* Gray, 20 Johns. 344; see *post*, § 347.

[3] Caldwell *v.* Raymond, 2 Abb. Pr. Rep. 193; and see Cass *v.* Anderson, 33 Vt. (4 Shaw), 182; Carter *v.* Andrews, 16 Pick. 1; *post*, §§ 349, 350 *a*; Solomon *v.* Lawson, 10 Jur. 796.

[4] Stone *v.* Cooper, 2 Denio, 293.

[5] Caldwell *v.* Raymond, 2 Abb. Pr. Rep. 193.

would be shown, there the existence or non-existence of those facts is material, and, of course, may be controverted by the defendant; if not controverted they are admitted, and need not be proved;[1] if controverted, they must be proved as part of the plaintiff's case. But where the inducement is not essential to the sufficiency of the statement of the cause of action, and where, without the facts stated as inducement, a cause of action can be shown, then the inducement is mere surplusage, redundant matter; no material issue can be raised upon it, it should not be controverted, and if controverted, need not be proved.[2] An example of superfluous inducement is the preliminary panegyric upon the plaintiff's character, with which it is so customary to preface all complaints for slander or libel. As it is unnecessary to the statement of a cause of action to aver the plaintiff's innocence, either by a general averment of good character, or a general averment of the falsity of the matter published, or by any particular averment, no such averment can be made the subject of an issue.[3]

§ 314. Where the charge was, "He (plaintiff) is a pitiful fellow, and not able to pay his debts," it was held not necessary to aver, by way of inducement, that the plaintiff was no pitiful fellow, and was able to pay his debts;[4] and where the charge was that plaintiff had given money to the defendant as a bribe, it was held, on motion in arrest of judgment, not necessary for the plaintiff to

[1] Dukes *v.* Jostling, 3 Dowl. Pr. Cas. 618; Chalmers *v.* Shackell, 6 C. & P. 475.

[2] Cox *v.* Thomason, 2 Cr. & J. 361; Langton *v.* Hagerty, 35 Wis. 10.

[3] Strachey's Case, Sty. 118. Action of slander in calling plaintiff a thief, &c.: the complaint prefaced the charge of speaking the words with the usual panegyric that plaintiff sustained a good name and character among her neighbors for moral worth, honesty, virtue and integrity. Defendant denied this part of the complaint, and on the trial the court charged the jury that such denial, not sustained by evidence, was an aggravation. The court above held this error, and granted a new trial; the preliminary panegyric was superfluous, and might have been stricken out on motion; its denial raised an immaterial issue. (Pink *v.* Catanich, 51 Cal. 420.)

[4] Hooker *v.* Tucker, Holt R. 39.

allege that he did not give the money.[1] Where the charge was of forging a note, the plaintiff averred, by way of inducement, that the note was genuine, this was held to be immaterial, equivalent only to the customary allegation of innocence, and did not require to be proved;[2] so where the charge was being guilty of treason, and the plaintiff alleged his innocence, it was held that he did not thereby impose on himself the burden of proving the allegation.[3]

§ 315. It will be convenient here to refer to the rule of pleading and of evidence, that where the defamatory matter states expressly or by necessary implication the existence of certain facts, the plaintiff may accept the statement and rely upon it, without being obliged either to allege it in his pleading or to establish its truth by evidence;[4] the defendant is estopped from *denying* the

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[1] Bendish *v.* Lindsey, 11 Mod. 194.

[2] Harmon *v.* Carrington, 8 Wend. 488. In this case it was contended on behalf of defendant that if the note was genuine, as plaintiff alleged, then there was no slander; held, however, that the note being genuine was no excuse for defendant's charge that the note was forged. Had this rule been applied in Fleischman *v.* Bennett (87 N. Y. 231), the decision would have been different.

Allegations of previous good reputation of plaintiff are superfluous and need not be denied. (Pink and wife *v.* Catanich, 51 Cal. 420.)

In Smith *v* Ottendorfer (3 N. Y. St. Rep. 187), the defendant had specifically denied the allegation of plaintiff, and on motion to strike out that denial, it was held at Chambers, that if the plaintiff did not wish to have the allegation of good reputation denied, he should not have inserted it in his complaint. At all events, the plaintiff cannot be prejudiced by the denial for the defendant can certainly prove the plaintiff's bad reputation in mitigation, if that fact be so pleaded, and, perhaps, if not pleaded. Whereas the defendant may be prejudiced by striking out the denial, he should have the benefit of the doubt, and the denial should be allowed to stand." (See § 349. *post.*)

[3] Coleman *v.* Southwick. 9 Johns. 45.

[4] Jones *v.* Stevens, 11 Price. 235; *ante*, note 1, p. 539; and *post*. Evidence, § 386. For the words. "That is the man who killed my husband," no allegation of the death of the husband is necessary. (Button *v.* Heyward, 8 Mod. 24.) "You hired J. S. to forge a bond;" no allegation that any bond was forged is necessary. (Cro. Car. 337.) In an action by husband and his wife. B., for slander, the declaration reciting that they were lawfully married, and that she was sister of C., and that the defendant falsely, &c., spoke of and concerning the wife of C., that they were not only brother and sister, but man and wife; held, that the plaintiff was not bound to prove the introductory averment that the wife was the sister of C., and that the words importing a charge of felony, viz., bigamy, were actionable. (Heming *v.* Power, 10 Mees. & W. 564.) Defendant, on being reminded

truth of his own charge. Thus, where the words of a lawyer were, "He arresteth without taking out writs," or "He is a knave in his practice," it was held that these words implied that the plaintiff was an attorney, and dispensed with any inducement of that fact.[1] And in slander for charging the plaintiff with the crime of murder, it is not necessary to allege, as inducement, the death of the person said to be murdered;[2] and generally it is unnecessary to show that the offense charged could have been committed,[3] or that the plaintiff was physically capable of committing the crime alleged against him.[4]

§ 316. As the plaintiff's right to redress depends en-

by plaintiff of a law suit which he (defendant) had recently lost, said, "Yes, your false swearing at that trial." Being told that he had better not again accuse plaintiff of swearing false, he said, "Any man who professed to be a Christian, as you do, and went into the box and swore false, as you did at that trial, had better join the church once more," &c. Defendant also said, "The folks who belonged to the church, and built tall steeples, thought they could swear false, or do anything they had a mind to." Held, that the slander admitted that a suit was pending, and it was to be intended that what plaintiff swore to was material, and that the words were sufficient to warrant a finding in favor of the plaintiff, without proof that the suit was in a court of competent jurisdiction, or that plaintiff swore falsely with a corrupt intent. (Kern *v.* Towsley, 51 Barb. 386; and see Spooner *v.* Keeler, 51 N. Y. 527.)

[1] Bell *v.* Thatcher, Freem. 277. And so where the language was, "He is a paltry lawyer, and plays with both hands." (2 Rolle Rep. 85.) The publication was: "It is going the rounds that Justice Royce will resign, and will attend to the law business of the railroad. It has been suspected for years that he was retained by the railroad." The declaration contained no averment that plaintiff was an attorney-at-law. Held, unnecessary. (Royce *v.* Maloney, 58 Vt. 437.)

[2] Tenney *v.* Clement, 10 New Hamp. 52; and see Carter *v.* Andrews, 16 Pick, 1; Stone *v.* Clark, 21 Pick. 51; Stallings *v.* Newman, 26 Ala. 300; Eckart *v.* Wilson, 10 S. & R. 44; *contra*, Chandler *v.* Holloway, 4 Porter, 17; see *ante*, note 11, p. 179.

[3] Colbert *v.* Caldwell, 3 Grant (Penn.), 181; but see Sawyer *v.* Hopkins, 9 Shep. 268.

[4] Chambers *v.* White, 2 Jones' Law (N. Car.) 383. In slander for charging plaintiff with theft of certain articles, complaint is sufficient, without alleging that articles had in fact been stolen, or that such articles had in fact ever been owned by persons from whom it was claimed they were stolen. (Durrah *v.* Stillwell, 59 Ind. 139.) Plaintiff alleged that defendant, in conversation with one E., in regard to the burning of certain houses, in the presence and hearing of E. and divers other persons, maliciously spoke of and concerning plaintiff the false and defamatory words following, viz: "That damned scoundrel (meaning plaintiff) knows all about it (meaning the burning of said houses), from beginning to end," thereby intending falsely to charge plaintiff with having willfully, etc., aided and abetted in setting fire to and burning said houses. Held sufficient. (Reeves *v.* Bowden, 97 N. C. 29.)

tirely upon the fact that the defamatory matter concerned him (§ 131), in order to show a right of action, that fact must appear on the face of the complaint.[1] Where the language published was unequivocal and directly referred to the plaintiff, the colloquium, of which presently, was alone sufficient to show this fact. But where the language was ambiguous in respect to the person to whom it applied, there, formerly, it was necessary; and where the common-law system of pleading prevails, it is still necessary, to state as inducement the circumstances which make it apparent that the language does concern the plaintiff;[2] and it was not sufficient to aver generally that the language was published concerning the plaintiff.[3] By statute the rule is otherwise in New York.[4]

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[1] A complaint of words attributing the death of a child to "neglect of *parent*," must, in some way, show that the complaining parent is the parent referred to. (Crane *v.* O'Reilly, 11 N. Y. St. Rep. 277.)

California Code of Civil Procedure does not dispense with the necessity of alleging where words are ambiguous, that readers or hearers knew plaintiff was intended. (DeWitt *v.* Wright, 57 Cal. 576; Rhodes *v.* Naglee, 66 *Id.* 680.) Where a libel consists in reporting the name of plaintiff in blank, in a report of business standing, which means that plaintiff is not in good standing, the complaint should so allege, giving the necessary explanation; and a complaint assuming to give the meaning of the libel without alleging what it is, is demurrable. (Bradstreet Co. *v.* Gill, 9 So. East. Rep. 753.)

[2] Hall *v.* Blandy, 1 Y. & J. 480; and see Brown *v.* Lamberton, 2 Binney, 34; Van Vechten *v.* Hopkins, 5 Johns. 211; Harper *v.* Delp, 3 Ind. 225; Parker *v.* Raymond, 3 Abb. Pr. R. N. S. 343.

[3] The State *v.* Henderson, 1 Rich. 179.

[4] *Ante*, § 310. And there is a like provision in the law of Missouri (Stieber *v.* Wensel, 19 Mo. [4 Bennet], 513); and Wisconsin (Van Slyke *v.* Carpenter, 7 Wis. 173); and Iowa (Swearingen *v.* Stanley, 23 Iowa, 115). "A distinct averment in regard to the person spoken of, and a clear reference of the calumnious words to that person is all that is required." (Miller *v.* Parish, 8 Pick. 384; see *post*, §§ 340, 341; and 1 Starkie on Slander, 390.) Of what is there stated the following is an abridgment: Where the plaintiff's name is mentioned, though a further description be given, the general averment is sufficient (Woodroff *v.* Vaughan, Cro. Eliz. 429), without alleging that the further description applied to the plaintiff; as where the speaking was alleged to be of the plaintiff, and the words were, "T. [meaning the plaintiff] is thy brother." And where the words were, "Captain Nelson is a thief," held not necessary to allege that plaintiff was a captain or known by that name. Where the plaintiff can show he was intended, he can maintain the action. (*Ante*, notes p. 113.) Thus, for the words, "The parson of Dale is a thief," he who was parson of Dale at the time may sue. And where the defendant spoke of that murderous knave Stoughton, held that Thomas Stoughton might sue. (Sheppard, Action of Slander, 59.) Where the language complained of

§ 317. We have seen that the actionable quality of language is sometimes affected by the circumstance that it affects the plaintiff in some certain capacity (§§ 132, 179); when, therefore, the plaintiff claims that the language is actionable, because it concerns him in some certain capacity or occupation, and it does not upon its face imply that he is in such capacity or occupation (§ 315), the complaint should properly allege by way of inducement that he filled such capacity, or was in, or carried on, or exercised such occupation *at the time of the publication complained of.* This may be shown by an averment that the plaintiff is of such a trade, or has carried on or exercised it for divers years, without adding last past,[1] because a person once in any certain occupation is presumed to continue therein (§ 189). But where the language affects the plaintiff in an office he holds during pleasure, a different rule, it is said, prevails, and the plaintiff's continuance in office must be alleged.[2] The complaint need not allege that the plaintiff gains his livelihood by his occupation (§ 182), nor that the plaintiff has qualified himself for the office or employment in which he is defamed. Thus, where the alleged libel concerned a candidate to serve in Parliament, it was held that the declaration need not set out the writ to show the plaintiff was such candidate.[3] But the occupation of the plaintiff should be described in apt terms. Thus, in an action by a barrister, it was held that he should allege he was *homo consiliarius*

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was, "These people up stairs," &c. There was no inducement to explain who these people were, but it was alleged that the publication was of and concerning the plaintiff. On the trial plaintiff failed, but a new trial was ordered, on reasons not satisfactory. The pleading was right, but it was incumbent on plaintiff to show by proof on the trial he was one of those people. (Cock *v.* Rief, 52 N. Y. Superior Co't, 302.)

[1] Tuthill *v.* Milton, Yelv. 159; Cro. Jac. 222; and see 2 Rolle R. 84; Dod *v.* Robinson, Aleyn, 63; Collis *v.* Malin, Cro. Car. 282; Beaumond *v.* Hastings, Cro. Jac. 240.

[2] Tuthill *v.* Milton, Yelv. 159; Cro. Jac. 222; and see Gallwey *v.* Marshall, 9 Ex. 300.

[3] Harwood *v.* Astley, 1 Bos. & P. New R. (4 Bos. & P.) 47; and *post*, § 320.

et in jure peritus, and that it was not sufficient to allege he was *eruditus in lege*.[1] "The declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession."[2]

§ 318. Where the language is actionable of the plaintiff as an individual, then, although it may also affect him in some occupation, it is not necessary to allege as inducement that the plaintiff exercised such occupation; and even if alleged, it need not be proved, because there is a cause of action without it (§ 179).[3] Thus, in an action for setting up near plaintiff's house an inscription insinuating that it was a house of ill-fame, &c., the declaration alleged that the plaintiff carried on the business of a retailer of wines; but the court held, that as the inscription was not alleged to have been published concerning the plaintiff as a retailer of wine, it might be struck out of the declaration, and need not be proved.[4] And in like manner, if the plaintiff has two trades, and both are alleged as inducement, and the language is actionable as affecting the plaintiff in one of them, proof of his exercising that one trade will suffice.[5]

§ 319. Too great minuteness in matter of inducement is to be avoided, because, in general, the proof must be co-extensive with the allegation; as where the plaintiff

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[1] 1 Starkie on Slander, 402. A complaint setting forth that the plaintiff was "engaged in the wooden ware business," sufficiently describes his employment as that of a buyer and seller of wooden ware. (Carpenter *v.* Dennis, 3 Sandf 305.)

[2] Denman, Ch. J., Ayre *v.* Craven, 2 Adol. & El. 2; 4 Nev. & M. 220; and see Alexander *v.* Angle, 1 Cromp. & J. 143.

[3] Gage *v.* Robinson, 12 Ohio, 250.

[4] Spall *v.* Massey, 2 Stark. R. 559.

[5] Figgins *v.* Cogswell, 3 M. & S. 369; cited Chalmers *v.* Shackell, 6 C. & P. 477. But where the plaintiff alleged that he was proprietor and editor of a newspaper, it was held insufficient for him to prove himself proprietor only. (Heriot *v.* Stuart, 1 Esp. 437; see *post*, end of § 338.)

alleged that he was an attorney, that he conducted a particular suit, and afterwards alleged that the defamatory matter was concerning his conduct in that suit, it was held that he must prove the existence of that suit,[1] And in an action for a libel on a constable, respecting his conduct in the apprehension of persons stealing a dead body, and part of the conduct stated in the first count was that of carrying the dead body to Surgeons' Hall, and the second count spoke of "his conduct respecting the said dead body," the court held that it was necessary in both counts to prove the introductory allegation that the body was carried to Surgeons' Hall; for the words "the said body," in the second count, incorporated all the descriptive circumstances introduced in the first. The plaintiff need not have burdened himself with the proof of such a fact, but the libel being stated to be of and concerning his conduct as to the dead body, it became most important to prove that part of his conduct.[2] But it is said,[3] "The omission to prove facts unnecessarily alleged will not be fatal unless by the form and mode of pleading they have been made descriptive of that which is material."

§ 320. It need not be alleged that the plaintiff was *legally qualified* or *licensed* to exercise the calling in which the language affects him; if he was not so qualified or licensed it is matter of defense to come from the defendant. In an action for slander, the plaintiff alleged that he was *in medicinis doctor*, and it was moved in arrest of judgment that he did not show he was licensed, but adjudged for the plaintiff.[4] And so in an action by a physician for words of him in his profession, it is sufficient for him to aver that he had used and exercised the profession of a physician; but where a plaintiff in such a case

[1] Parry *v.* Collis, 1 Esp. 339.
[2] Teesdale *v.* Clement, 1 Chit. 603.
[3] 1 Starkie on Slander, 407.
[4] Dr. Brownlow's Case, Mar. 116, pl. 3; and *ante*, §§ 182, 183, 189.

went further, and averred that he was a physician, and had duly taken the degree of a doctor of physic, it was held that he must prove his degree as stated.[1]

§ 321. In a complaint founded upon a charge of *false swearing* as a witness, such a charge not being actionable *per se* (§ 171), to show a cause of action there should be an *inducement* of the pendency of a suit or judicial proceeding, in which the plaintiff was examined as a witness, and a *colloquium* that the charge was concerning the plaintiff as such witness.[2] If there were several suits between the same parties, tried on the same day, it is not necessary, it seems, to distinguish in which suit the false swearing occurred.[3] And where the suit or proceeding was before a court or officer of limited jurisdiction, it must be further shown that such court or officer had jurisdiction of the suit or proceeding; an averment that the justice then and there had jurisdiction of the action was held sufficient without setting forth the facts which gave the jurisdiction.[4] The plaintiff need not show that the justice was duly commissioned.[5] A declaration which alleged that the words

[1] Moises *v.* Thornton, 8 T. R. 303.

[2] Stone *v.* Clark, 21 Pick. 51; Gale *v.* Hays, 3 Strobh. 452; Sharp *v.* Wilhite, 2 Humph. 434; Williams *v.* Spears, 11 Ala. 138; and *semble* it should be alleged that defendant intended to impute a charge of perjury. (Wood *v.* Scott, 13 Vt. 42; Sanderson *v.* Hubbard, 14 *Id.* 462.) Foresworn becomes objectionable only when applied to one who has given testimony under the sanction of a judicial oath. (Pittsburg, &c. *v.* McCurdy, 6 Cent. Rep. 721), and so of a charge he made false affidavits. (Casselman *v.* Winship, 3 Dakota, 292.) It is not necessary to state what the witness testified. (Whitaker *v.* Carter, 4 Ired. 461.) A complaint for slander set out that in a suit before a justice P. F. was a witness to material matter; that defendant, in a conversation concerning said trial and concerning the plaintiff being guilty of subornation of perjury, published, &c., the words, "P. F. swore to a lie, and you [plaintiff] hired him." It was objected to the complaint that it did not allege that the conversation was of and concerning the testimony of P. F. on the trial. Held, after verdict, the complaint was good. (Shimer *v.* Bronnenburg, 18 Ind. 363.) Declaration for false swearing in Virginia (Hogan *v.* Wilmoth, 16 Gratt. 80); in Indianna (Dorsett *v.* Adams, 50 Ind. 129).

[3] Harris *v.* Purdy, 1 Stew. 231.

[4] Sandford *v.* Gaddis, 13 Ill. 329.

[5] Pugh *v.* Neal, 4 Jones' Law (N. Car.) 367. It was held not necessary to allege either that the justice had jurisdiction or that the testimony was material. (Dalrymple *v.* Lofton, 2 M'Mullan, 112.) But as to the necessity of alleging jurisdiction, see Shel-

were spoken "whilst the plaintiff was giving testimony as a witness under the solemnities of an oath, before an acting justice of the peace,"[1] and a declaration which alleged that the plaintiff was, at the instance of the defendant, examined on oath administered by a justice, according to law, as a witness for the defendant, were held sufficiently to allege jurisdiction.[2] "Squire H." was held a sufficient description of P. H., esquire, a justice of the peace.[3]

§ 322. It should be alleged that the testimony was material to the point in issue, but it is not necessary to show to what particular degree the point in respect to which a party is charged with false swearing was material to the issue. If it goes to prove a material circumstance or link in the chain of evidence, it is sufficient.[4] And it has been said that an averment of the materiality of the evidence may be altogether omitted;[5] at least the absence of such an allegation will be cured by verdict.[6] It is not necessary to allege that the justice had authority to administer the oath.[7] But it should be alleged that the

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lenbarger *v.* Norris, 2 Carter (Ind.) 285; Jones *v.* Marrs, 11 Humph. 214; Chapman *v.* Smith, 13 Johns. 78; Bonner *v.* McPhail, 31 Barb. 106; Cannon *v.* Phillips, 2 Sneed (Tenn.) 185.

Where the charge is that the plaintiff committed *perjury*, that implies a false swearing before a competent tribunal, and jurisdiction need not be alleged. (Green *v.* Long, 2 Cai. 91.) Where the charge is perjury committed in a foreign State, it must be averred that by the laws of such State perjury is an offense to which is annexed an infamous punishment. (Sparrow *v.* Maynard, 8 Jones' Law [N. Car.] 195; and see *ante*, note 12, p. 169.)

[1] Lewis *v.* Black, 27 Miss. (5 Cush.) 425.

[2] Shellenbarger *v.* Norris, 2 Carter (Ind.) 285.

[3] Call *v.* Foresman, 5 Watts, 331; and see *ante*, note 6, p. 146: "N. T., esquire, aforesaid," held sufficient description of a justice of the peace. (Canterbury *v.* Hill, 4 Stew. & Port. 224.)

[4] Hutchins *v.* Blood, 25 Wend. 413; and see Witcher *v.* Richmond, 8 Humph. 473; Shroyer *v.* Miller, 3 W. Va. 158; Hogan *v.* Wilmoth, 16 Gratt. 80; note 2, p. 189, *ante*.

[5] Wetsel *v.* Lennen, 13 Ind. 535; Cannon *v.* Phillips, 2 Sneed. 185; Wolbrecht *v.* Baumgarten, 26 Ill. 291; Harbison *v.* Shook, 41 Ill. 142.

[6] Niven *v.* Munn, 13 Johns. 48. In slander for the charge of perjury, the materiality of the alleged false testimony is for the court to determine, and if left to the jury it is error. (Steinman *v.* McWilliams, 6 Barr, 170; Power *v.* Price, 12 Wend. 500; affirmed 16 Wend. 450.) Or ground for a new trial. (Dalrymple *v.* Lofton, 2 M'Mullan, 112.)

[7] Sanford *v.* Gaddis, 13 Ill. 329; but see Jones *v.* Marrs, 11 Humph. 214.

plaintiff was legally sworn.[1] The defendant cannot show as a defense that the plaintiff was not a competent witness.[2] The absence of allegations of jurisdiction in the justice or materiality of the testimony may be cured by a plea of justification,[3] or by a verdict.[4]

§ 323. Properly the colloquium or allegation of *a discourse* is the allegation that the language published was concerning the plaintiff, or concerning the plaintiff and his affairs, or concerning the plaintiff and the facts alleged as inducement (§ 129). But the term colloquium is frequently employed as synonymous with inducement, or to signify the inducement and the colloquium properly so called. As heretofore stated (§§ 310, 316), it must be shown on the face of the complaint that the language was published concerning the plaintiff, and the proper mode of doing this is by a direct averment that the publication was "of and concerning the plaintiff."[5] This averment may, however, be supplied by any equivalent allegation, and may be altogether dispensed with where it appears other-

[1] Sanderson *v.* Hubbard, 14 Vt. 462.

[2] Harris *v.* Purdy, 1 Stew. 231. A declaration in slander, charging the words spoken as follows: "He (meaning plaintiff) has sworn falsely," &c., "against me (meaning defendant), and *he* (meaning defendant) could prove it," was held bad after verdict; by "he" in the latter clause, as pleaded, the defendant could not have meant himself. (Bowdish *v.* Peckham, 1 Chip. 146; but see *post*, note to § 343.)

[3] Witcher *v.* Richmond, 8 Humph. 473; Attebury *v.* Powell, 29 Mo. 429; Sanderson *v.* Hubbard, 14 Vt. 462.

[4] Palmer *v.* Hunter, 8 Mo. 512; Morgan *v.* Livingston, 2 Rich. 573; Niven *v.* Munn, 13 Johns. 48; but see Wood *v.* Scott, 13 Vt. 42; an inaccurate averment is cured by verdict, but a necessary averment cannot be supplied by verdict. (Reg. *v.* Bradlaugh, 3 Q. B. Div. 607.)

[5] Where the words amount to a libelous charge against some person, but it is uncertain as to their application to plaintiff, such application may be shown by proof of extrinsic facts, and under the statute, it is not necessary to allege those facts in the complaint. (Petsch *v.* St. Paul's Dispatch Printing Co. [Minn.] 41 No. West. Rep. 1034.)

The complaint not alleging publication to be of and concerning plaintiff, and publication not appearing upon its face to refer to plaintiff, held bad on demurrer. (McCallum *v.* Lambie, 145 Mass. 234.)

Where plaintiff was known as "Walnuts," and defendant had said that "Walnuts" had robbed him; held, that to sustain an action for such words, it must be alleged that the persons who heard the charge knew that plaintiff was intended by the word Walnuts. (Keeling *v.* McCall, 36 Ind. 321.)

wise with sufficient certainty on the face of the complaint that the publication was in fact concerning the plaintiff.[1] And although, in actions for slander and libel, inducement may be necessary to explain the matter alleged to be libelous, it is enough to state in the declaration that the publication was "of and concerning" the plaintiff, without also stating that it was "of and concerning" such matter,[2] or of and concerning the plaintiff in the occupation alleged

[1] It is sufficient to aver substantially that the words were spoken of plaintiff; an express averment of the fact is not necessary. (Brown *v.* Lamberton, 2 Binn. 34; Brashear *v.* Shepherd, Snead [Ky.] 249; Nestle *v.* Van Slyke, 2 Hill, 284; but see Titus *v.* Follett, 2 Hill, 318; Tyler *v.* Tillotson, 2 Hill, 508; Cave *v.* Shelor, 2 Munf. 193; Harper *v.* Delp. 3 Ind. 225; Rex *v.* Marsden, 4 M. & S. 164; Baldwin *v.* Hildreth, 14 Gray [Mass.] 221.) On demurrer, where the words did not name the plaintiff, the omission of a colloquium of and concerning the plaintiff was held fatal, and not aided by the innuendoes. (Milligan *v.* Thorn, 6 Wend. 412; and see Church *v.* Bridgman, 6 Mo. 190.) Nor by the verdict, the language being in the third person. (Sayre *v.* Jewett, 12 Wend. 135.) If there be a colloquium sufficient to point the application of the words to the plaintiff, if spoken maliciously, he must have judgment. (Lindsey *v.* Smith, 7 Johns. 359.) Where actionable words are spoken to a plaintiff, it is sufficient to allege a discourse with him, without an averment that the words were concerning the plaintiff. (Osborn *v.* Forshee, 22 Mich. 209.) But where the words are in the third person, as, "He is a thief," there, although a discourse of the plaintiff is alleged, it must also be alleged that the words were concerning the plaintiff. And it is not sufficient in such a case to connect the words with the plaintiff by an innuendo. (1 Stark. Sland. 384.) But where a discourse of the plaintiff is laid, and there is an innuendo of the plaintiff, it seems that the want of a direct averment that the words were concerning the plaintiff must be pointed out by special demurrer [motion to make certain]; but if no discourse concerning the plaintiff is alleged, then the want of an allegation that the words concerned him would be a defect in substance. (*Id.*; Skutt *v.* Hawkins, 1 Rolle R. 244.) If a plaintiff has omitted, in his declaration, to state that the libel was spoken of himself, he may supply the same by parol evidence. (Newbraugh *v.* Curry, Wright, 511.) But this is doubtful, perhaps, for such a defect the complaint will, upon the trial, be dismissed. (Crane *v.* O'Reilly, 13 Civ. Pro. Rep. 71.) Where A. says of B. & C., "*you* have committed such an offense," though B. & C. may have separate actions, the words must be alleged to have been spoken of both. (Cro. Car. 512.) Where the declaration states a colloquium with G., of and concerning the children of G., and of and concerning C., one of the children of G., and the plaintiff in the suit in particular, and that the defendant said, "Your children are thieves, and I can prove it," the colloquium conclusively points the words, and designates the plaintiff as one of the children intended. And a colloquium is sufficient to give application to words still more indefinite. (Gidney *v.* Blake, 11 Johns. 59; but see what is said 1 Stark. Sland. 385; note to § 181, *ante*; also *ante*, § 129.)

[2] O'Brien *v.* Clement, 4 D. & L. 563; Gutsole *v.* Mathers, 1 M. & W. 495; Shimer *v.* Bronnenburg, 18 Ind. 363.

in the inducement.[1] Where the declaration alleged that the defendant published a libel of and concerning the plaintiff, containing, &c., the false libelous matters following (without saying of and concerning the plaintiff); held, in error, that for want of an averment that the particular matter was of and concerning the plaintiff, and there being no innuendo that such matter related to him, the declaration was bad, and a *venire de novo* was awarded.[2] A declaration which alleged that the plaintiffs were traders under the firm of T. & Co., and averring that, in a discourse of and concerning them, their circumstances and business, the defendant said, "T. & Co. are down," &c., without repeating that this was said of and concerning the plaintiffs, was held bad on special demurrer, although good in substance.[3] A complaint purported to set out six separate causes of action. Defendant demurred to the first and secondly alleged causes of action, on the ground that they did not state facts sufficient to constitute a cause of action. The complaint alleged that each publication was of and concerning the plaintiff. In the articles upon which the first and secondly alleged causes of action were predicated, plaintiff was not mentioned by name and those articles upon their face did not refer to him, but to a firm of Gaff, Fleischman & Co., plaintiff alleged in his complaint that he never was a member of the firm of Gaff,

[1] Wakley *v.* Healey, 18 Law Jour. Rep. 241, C. P.; *contra*, see Barnes *v.* Trundy, 31 Maine (1 Red.) 321. Where the language of the libel shows on its face that it was used of and concerning plaintiff in an acquired capacity or special character, an express averment that it was so used is unnecessary. (Stoll *v.* Houde, 34 Minn. 193.)

It is not sufficient for plaintiff to allege, that he was, as a member of a business firm, engaged in the business of refining sugar; to make the innuendo available, it must appear with sufficient certainty that the words were spoken of plaintiff in his business relations as a sugar refiner. (Havermeyer *v.* Fuller, 10 Abb. N. C. 9.)

[2] Clement *v.* Fisher, 7 B. & Cr. 459; 1 M. & Ry. 281.

[3] Titus *v.* Follett, 2 Hill, 318; and see Taylor *v.* State, 4 Ga. 14. Where the meaning of the language is uncertain, or where it is uncertain to whom the language refers, the complaint should contain averments showing the meaning of the language and to whom it refers. (Carey *v.* Allen, 39 Wis. 481.)

Fleischman & Co. The Court of Appeals sustained the demurrer, holding in effect that as plaintiff denied he was connected with Gaff, Fleischman & Co., and as the alleged libels on their face referred only to that firm, it plainly showed plaintiff was not intended.[1]

§ 324. A publication by the defendant must be alleged [§ 93]. The publication need not be set forth in any technical form of words.[2] But it must be alleged positively, and not by way of recital;[3] and, therefore, a declaration which commenced, "For that *whereas*" the defendant intending, &c., spoke, &c., was held bad on special demurrer.[4] In slander for English words, it should be alleged that the defendant spoke the words in the presence and hearing of *divers* persons,[5] or of certain persons, naming them,[6] or of certain persons named and divers others, not naming the others.[7] Published, *ex vi termini*, imports a speaking in the presence and hearing of a third party;[8] and, therefore, to allege that the defendant *pub-*

[1] Fleischmann *v.* Bennett, 87 N. Y. 231. We find it impossible to reconcile this decision with the law as established by statute and previous authority.

[2] Baldwin *v.* Elphinstone, 2 W. Black. 1037; Wallis *v.* Morgan, 50 Ind. 318; Roberts *v.* Lovell, 38 Wis. 211; *ante*, note 1, p. 89. In slander a complaint is bad if it does not allege that the slanderous words were spoken or published by defendant. (Watts *v.* Morgan, 50 Ind. 518; Mann *v.* Hauts, 40 Ind. 122.

A complaint against two defendants, which alleges the writing by one defendant and the printing and publishing of the contents of such writing by the other defendant, shows a cause of action against both, and does not improperly join causes of action. (Baker *v.* McClellan, 21 N. Y. St. Rep. 893.) It was held sufficient to allege that the defendant was the proprietor of the newspaper in which the alleged libel was published. (Hunt *v.* Bennett, 19 N. Y. 173.)

[3] Donaghe *v.* Rankin, 4 Munf. 261.

[4] Brown *v.* Thurlow, 4 D. & L. 301; 16 M. & W. 36; Coffin *v.* Coffin, 2 Mass. 358; Houghton *v.* Davenport, 23 Pick. 235.

[5] To allege a speaking merely is not sufficient. (Style, 70; 1 Stark. Sland. 360.) In Indiana, by statute, it is sufficient merely to allege the speaking. (Guard *v.* Risk, 11 Ind. 156; Hutts *v.* Hutts, 51 Ind. 583.) And so in Missouri (Atwinger *v.* Fellner, 46 Mo. 276; Steiber *v.* Wensel, 19 Mo. 513); and held that an averment that the defendant "did, in certain conversations, utter, publish, and declare," sufficiently implies that the words were spoken in the presence of other persons. (Hurd *v.* Moore, 2 Oregon, 85.)

[6] Burbank *v.* Horn, 39 Maine (4 Heath), 233; *ante*, note 3, p. 89.

[7] Bradshaw *v.* Perdue, 12 Ga. 510; Ware *v.* Cartledge, 24 Ala. 622.

[8] Duel *v.* Agan, 1 Code Rep. 134; *ante*, note 3, p. 89.

lished the words is sufficient, without averring specially the presence of others.[1] And an allegation that the words were spoken would be sufficient, without stating the presence of any third person, if accompanied by any averment which necessarily implies a publication to a third person—as that the defendants *palim et publicé promulgant de querente*.[2] In the case of English words, it is not necessary to allege that the persons present either heard or understood what was said; for until the contrary is made to appear, it will be intended that those present both heard and understood the words; but in the case of a publication of foreign words, it must be alleged that the persons present understood them.[3]

§ 325. Where the publication was made in writing, *published* is the proper and technical term by which to allege the publication, and this without reference to the

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[1] Burton *v.* Burton, 3 G. Greene, 316; and see Shinloub *v.* Amerman, 7 Ind. 347; Guard *v.* Risk, 11 Ind. 156; Emmerson *v.* Marvel, 55 Ind. 265.

[2] Taylor *v.* How, Cro. Eliz. 861. Prior to the statute 2 Geo. II, ch. 14, pleadings in the courts of England were in Latin, which will explain why the quotations from the pleadings in the early decisions are in Latin.

[3] Wormouth *v.* Cramer, 3 Wend. 395; 1 Stark. Slan. 360; Cro. Eliz. 396; 480, 865; Cro. Jac. 39; Cro. Car. 199; Noy, 57; Golds. 119; Zeig *v.* Ort, 3 Chandler (Wis.) 26; and see *ante*, notes, p. 83; Simonson *v.* Herold Co. 21 No. West. Rep. 790; Mielenz *v.* Quasdorf, 68 Iowa, 726. Barsotti, editor of the Italian newspaper *Il Progresso Italio Americano*, brought suit for libel against Baricelli, editor of the Italian newspaper *Il Progresso*. Defendant moved before Judge Truax to vacate an order of arrest which had been granted against defendant. He claimed that the alleged libel being in a foreign language, and no allegation in the complaint that persons seeing the paper understood the language, there was not sufficient to sustain an arrest. The Judge so held and vacated the order. (N. Y. Superior Co't, May, 1881; see *ante*, § 97.) See an apparent departure from this rule, probably because special damage was alleged, Singer *v.* Bender, 64 Wis. 169; also Steketee *v.* Kimm, 48 Mich. 322. After verdict, a declaration which alleges words spoken in a foreign language, without alleging that the words were understood by the hearers, was sustained (Kiene *v.* Ruff, 1 Clarke [Iowa], 482); and in Pennsylvania, held not necessary to allege that foreign words were understood. (Palmer *v.* Harris, 60 Penn. 156.) In Maynard *v.* Firemen's Ins. Co. (34 Cal. 48), the words complained of were not libelous *per se*, and the complaint only averred a libelous intent and meaning on the part of defendant, without averring that such words were so understood by those to whom they were published. A demurrer on the ground that the words did not constitute a libel was sustained. (See Cary *v.* Allen, 39 Wis. 481.)

precise degree in which the defendant was instrumental to the publication.[1] But any equivalent allegation will suffice. Where it was alleged that the defendant printed and caused to be printed in the St. James' Chronicle, that was held sufficient;[2] and so was the allegation that the defendant "did publish *and* cause and procure to be published," a certain libel addressed to the plaintiff,[3] but where the allegation was that the defendant *scripsit, fecit, et publicavit, seu scribi fecit et publicari causavit*, it was held to be insufficient, and judgment was arrested on account of the uncertainty of the disjunctive charge.[4] To allege that the defendant is proprietor of a certain newspaper named, and that the libel was published in such paper, was held a sufficient averment of a publication by the defendant.[5] But to allege that defendant sent a letter to plaintiff which was received and read by him, does not show a sufficient publication.[6] If a defamatory writing is shown to have been put in a situation in which it might have been read, it is unnecessary to allege it was in fact seen or read.[7]

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[1] Lamb's Case, 9 Coke, 59; 1 Stark. Sland. 359. Allegation that published sufficient. (The State *v.* Dowd, 39 Kan. Rep. 412; The State *v.* Barnes, 32 Me. 530.) Printed and caused to be printed equivalent to published. (*Id.*) Mode of publication need not be alleged. (*Id.*) A complaint which alleges the composition of a libelous article by one and its publication in a newspaper by another, is sufficient to charge both as publishers. (Baker *v.* McClellan, 21 N. Y. St. Rep. 893.)

[2] Baldwin *v.* Elphinstone, 2 W. Black. 1037.

[3] Waistel *v.* Holman, 2 Hall, 172. But to allege that defendant composed, wrote and delivered a certain libel addressed to the plaintiff, was held insufficient. (*Id.*)

[4] Rex *v.* Brereton, 8 Mod. 328. Held sufficient to allege that defendant composed, uttered, wrote and sent to D. (Benedict *v.* Westover, 44 Wis. 404.) The allegation that defendant "published" is a declaration that he caused to be circulated "among sundry and divers persons." (Sproul *v.* Pillsbury, 72 Maine, 20; Benedict *v.* Westover, 44 Wis. 404; Indianapolis Sun Co. *v.* Horrel, 53 Ind. 527.)

[5] Hunt *v.* Bennett, 4 E. D. Smith, 647; affirmed 19 N. Y. 193. But where the action was against a corporation as the owner and publisher of a newspaper, and also against C., alleged to be principal proprietor and manager, it was held not to show any liability of C. To make him liable it must be shown he took part in or did some act to make him liable as publisher. (Simonsen *v.* Herold Co. 61 Wis. 626.)

[6] Lyle *v.* Clason, 1 Caines, 581; but see Mielenz *v.* Quasdorf, 68 Iowa, 726.

[7] Giles *v.* The State, 6 Ga. 276; *ante*, note 1, p. 88.

§ 326. The place of publication may be alleged with a *videlicet*.[1] It is not material, and need not be proved as laid.[2]

§ 327. The time of speaking the words is not material.[3] In one case, it was held that the words might be laid with a *continuando*,[4] but this was denied, on the ground that words spoken at one time constitute one cause of action, and words spoken at another time constitute another cause of action.[5] The *continuando*, however, was held to be surplusage, and not ground for special demurrer.[6] An allegation, "and further, that defendant, on divers days and times, between that day and the commencement of this action, spoke the same words," was struck out as redundant.[7]

§ 328. It should appear on the face of the complaint, by some appropriate averment, that the publication was made *without legal excuse*. *Ex malitia*, in its legal sense, imports a publication that is false, and made without legal excuse;[8] an averment that the publication was made with malice or maliciously has ever been and still is the customary averment; but any form of words from which malice (absence of excuse) can be inferred, as that the publication was made falsely or wrongfully, will suffice.[9] Neither the term malice,[10] nor falsely, nor wrongfully, is essential,[11] at

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[1] Burbank *v.* Horn, 39 Maine (4 Heath), 233.

[2] Jefferries *v.* Duncombe, 11 East, 266; *ante*, § 110.

[3] Potter *v.* Thompson, 22 Barb. 87; Hosley *v.* Brooks, 20 Ill. 115; but see *ante*, § 109. It is not necessary to prove the publication on the day alleged. (Norris *v.* Elliott, 39 Cal. 72; Hallowell *v.* Guntle, 82 Ind. 554.) But to allege the publication was *about* a certain day was held to be uncertain. (Cole *v.* Babcock, 78 Me. 41.)

[4] Burbank *v.* Horn, 39 Maine (4 Heath), 233.

[5] Swinney *v.* Nave, 22 Ind. 178; *ante*, § 113.

[6] Cummins *v.* Butler, 3 Blackf. 190.

[7] Gray *v.* Nellis, 6 How. Pra. R. 290.

[8] Sutton *v.* Johnstone, 1 T. R. 493; Rowe *v.* Roach, 1 M. & S. 304; *ante*, §§ 71, 73.

[9] Moor, 459; Owen, 451; Noy, 35; Dillard *v.* Collins, 25 Gratt. (Va.) 343; *ante*, note 1, p. 75.

[10] Opdyke *v.* Weed, 18 Abb. Pr. R. 223, note; Viele *v.* Gray, 10 *Id.* 6; *ante*, note 1, p. 75.

[11] Style, 392. An allegation that the publication was a libel, held equiv-

least after verdict.[1] A declaration which charged the publication to be "malicious, injurious, and unlawful," was held sufficient.[2] Where it appeared on the face of the declaration that the defamatory matter was published in an affidavit in a proceeding in an action, and was pertinent to the matter in hand, held that the declaration was demurrable, because, notwithstanding the allegation that the publication was false and malicious, it appeared on the face of the declaration that the publication was a privileged one.[3] Alleging a *scienter* is not necessary.[4]

§ 329. The complaint should set out, and purport to set out, the very words published.[5] The proper term

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alent to an allegation that it was false and malicious. (Hunt *v.* Bennett, 19 N. Y. 176; §§ 73, 74, *ante.*

[1] 2 Saund. 242; White *v.* Nichols, 3 How. U. S. Rep. 266, 284; Taylor *v.* Kneeland, 1 Doug. (Mich.) 67.

[2] Rowe *v.* Roach, 1 Mau. & Sel. 304.

[3] Garr *v.* Selden, 4 N. Y. 91.

[4] It is sufficient to allege that the words are false and malicious without alleging *scienter*, even when the words may have been part of a privileged communication. (Andrew *v.* Deshler, 14 Vroom [N. J.] 16; see *ante*, § 141.)

[5] Finnerty *v.* Barker, 7 N. Y. Legal Observer, 317; Sullivan *v.* White, 6 Irish Law Rep. 40; Whitaker *v.* Freeman, 1 Dev. 271; Lee *v.* Kane, 6 Gray (Mass.) 495; Taylor *v.* Moran, 4 Metc. (Ky.) 127; Burns *v.* Williams, 17 The Reporter, 375 (N.Car.); Rex *v.* Bradlaugh, 38 Law Times, 118; Stener *v.* The State, 17 The Reporter, 670 (Wis.); Commonwealth *v.* Wright, 1 Cush. 46. "In libel and slander the very words are the *facts* and must be pleaded." (Harris *v.* Warre, 27 Week. Rep. London, 461.) The omission of the exact words was ground of motion in arrest of judgment. (Wright *v.* Clements, 3 B. & Ald. 503.) In Gutsole *v.* Mather (1 M. & W. 495), the precise words were not set out, but merely the effect of them, the declaration alleging that the defendant wrongfully, &c., represented in the presence and hearing of divers persons (naming them) that said tulips were stolen property. On motion in arrest of judgment, the declaration was held bad for not setting out the words *verbatim*. In McDonald *v.* Dun (12 Low. Can. Rep. 345) the declaration alleged that defendants, a mercantile agency, had falsely and maliciously written in a book kept in their office, the words "*to the effect*" that plaintiff "was not reliable, or that plaintiff was *insolvent*, or words to that effect, but as defendants have refused to let plaintiff see the book, he is unable to state the exact words therein written." On exceptions, equivalent to a demurrer, the action was dismissed. And where the declaration alleged slander of plaintiff's wife by imputing adultery and prostitution, without setting out the words and concluding with special damage, held bad. (Breen *v.* McDonald, 22 Up. Can. C. P. 298; see note 10 p. 246, *ante.*) In Pennsylvania it has been held not necessary to set out the identical words complained against, and that to set forth their purport is sufficient. (Lukehart *v.* Byerly, 53 Penn. St. 418.) And so in Massachusetts. (Robbins *v.* Fletcher, 101 Mass. 115; Brettun *v.* Anthony, 103 Mass. 37; see *ante*, note 10, p. 246.) A new trial was granted because the words published were not set forth in the complaint literally. (Walsh *v.* The State,

by which to indicate that the very words are set forth is *tenor*.[1] "Tenor and effect" is now held to be sufficient, but there are decisions to the contrary.[2] It is not sufficient to allege that words were published to the effect following,[3] or in substance as follows,[4] or purport-

2 McCord, 248.) Where the substance only of the defamatory matter was charged in the declaration for libel, the court, on the trial, allowed the plaintiff to amend by setting out *verbatim* the letter containing the matter complained against. (Saunders *v.* Bate, 1 Hurl. & N. 402.) A claim alleged that defendant sent to a chief constable and superintendent of police, letters charging plaintiff with a murder, and required his arrest; that the superintendent in consequence endeavored to arrest plaintiff; that defendant had no reasonable or probable cause for making the charge; that the same was false, and made maliciously. On demurrer held that the claim was bad, because if it was for libel the defamatory words were not set out; if for malicious prosecution, none had been instituted. (Harris *v.* Warre, 4 L. R. C. P. D. 125.) In a criminal proceeding the complaint charged that the defendant published of and concerning complainant a certain "false, scandalous, malicious, and defamatory libel, therein and thereby accusing and imputing to said Adolphus A. Ellis, prosecuting attorney, infamous and degrading acts," namely, of refusing to prosecute a suspected crime of murder, because the law forbade his taking bribes. Held complaint was sufficient. (People *v.* Jones, 62 Mich. 304.] Certain States provide by statute what words shall be actionable. (§ 153.) It is held that acts declaring what words are actionable are public laws, of which courts are bound to take notice, and the complaint or declaration need not recite or refer to the statute (Sanford *v.* Gaddis, 13 Ill. 329; Elam *v.* Badger, 23 Ill. 498), except by alleging that the words were published against the form of the statute in such case provided (Terry *v.* Bright, 4 Md. 430); but the absence of this allegation will be cured by verdict. (Wilcox *v.* Webb, 1 Blackf. 258.) As to declaring upon the statutes of Virginia and Georgia, see Mosely *v.* Moss, 6 Gratt. 534; Holcombe *v.* Roberts, 19 Ga. 588; Hawks *v.* Patton, 18 Ga. 52.

[1] Commonwealth *v.* Wright, 1 Cush. 46; Wright *v.* Clements, 3 B. & Ald. 503. To allege "a certain receipt for money, as follows, that is to say," was held equivalent to an allegation "according to the tenor following, or in the words and figures following, that is to say." (Rex *v.* Powell, 1 Leach C. C. 77, 4th ed.; 2 East P. C. 976; 2 Wm. Black. R. 787.) In a declaration for slander of plaintiff in his trade, a count alleging that the defendant, in a certain discourse, in the presence and hearing of divers subjects, falsely and maliciously charged the plaintiff of being in insolvent circumstances, and stating special damage, but without setting out the words, was held ill. (Cook *v.* Cox, 3 M. & S. 110.)

[2] Newton *v.* Stubbs, 3 Mod. 71; 2 Show. 435.

[3] Ford *v.* Bennett, 1 Ld. Raym. 415; Rex *v.* Beare, 2 Salk. 417.

[4] Wright *v.* Clements, 3 B. & Ald. 503. Where a declaration for a libel sets out a publication which refers to a previous publication, but, unless by reference to the language of the previous publication, contains no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear in the declaration to be set out *verbatim*, and not merely in substance. Therefore judgment was arrested as to the second count of a declaration, which, after reciting that defendant published a statement "*in substance* as follows," setting out the publication charged in the first count, charged that defendant afterwards published of and concerning plaintiff, and of and

ing,[1] or that the words were in substance as follows, or according to the purport and effect following, or in manner and form following,[2] or that the words were of a certain tenor, import and effect.[3] Nor are quotation marks sufficient to indicate that the exact words are set forth.[4] Where the defamation consists in the adoption of words spoken by another, the declaration must set forth the words with the same particularity as though the action were against that other.[5]

§ 330. Where the words were published in a foreign language, the foreign words must be set forth,[6] together with a translation into English (§ 97). To set forth the foreign words alone, or the translation alone, would not be

concerning the first publication, a statement that the copper tank was fitted up in a schooner belonging to the plaintiff. (Solomon *v.* Lawson, 8 Q. B. 823.) As follows is equivalent to the words and figures following. (Clay *v.* The People, 86 Ill. 147.)

[1] Wood *v.* Brown, 6 Taunt. 169; and see Cook *v.* Cox, 1 M. & S. 110. Alleging the speaking of certain words, or words of the same import, was held good after verdict. (Bell *v.* Bugg, 4 Munf. 260.)

[2] Bagley *v.* Johnson, 4 Rich. 22; Watson *v.* Music, 2 Miss. 29; Zeig *v.* Ort, 3 Chand. (Wis.) 26; Bassett *v.* Spofford, 11 New Hamp. 127; Churchill *v.* Kimble, 3 Ham. 409; Rex *v.* May, 1 Doug. 193. A count in slander stating that defendant charged plaintiff with the crime of forgery, held bad (Yundt *v.* Yundt, 12 S. & R. 427); and so of perjury (Ward *v.* Clark, 2 Johns. 10); and where a count alleged that defendant charged plaintiff with the crime of theft, without setting out the exact words, it was held bad after verdict. (Parsons *v.* Bellows, 6 New Hamp. 289.) In Massachusetts, even before the statute of 1852, it was held sufficient to allege that defendant accused plaintiff of a certain crime, as stealing, without setting out the words spoken. (Pond *v.* Hartwell, 17 Pick. 269; Allen *v.* Perkins, *Id.* 369; Gardner *v.* Dyer, 5 Gray, 22; Nye *v.* Otis, 8 Mass. 122; Whiting *v.* Smith, 13 Pick. 364; Day *v.* Homer, 13 Pick. 535; and see Kennedy *v.* Lowry, 1 Binn. 393; Grubbs *v.* Keyser, 2 McCord, 305.) But, in that State, the defendant is entitled to a bill of particulars setting forth the exact words. (See Payson *v.* Macomber, 3 Allen, 71.) A count in slander alleging that defendant wrongfully and without reasonable cause "imposed the crime of felony" upon the plaintiff was, after verdict, held good. (Davis *v.* Noakes, 1 Stark. 377; Hill *v.* Miles, 9 New Hamp. 9.) In actions for malicious prosecution, it is sufficient to declare *quod crimen felonice imposuit*, without stating the words. (Pippet *v.* Hearn, 5 B. & Ald. 634; Blizard *v.* Kelly, 2 B. & C. 283; Davis *v.* Noake, 6 M. & S. 33.)

[3] Forsyth *v.* Edmiston, 5 Duer, 653.

[4] Commonwealth *v.* Wright, 1 Cush. 46.

[5] Blessing *v.* Davis, 24 Wend. 100.

[6] Zenobio *v.* Axtell, 6 T. R. 162. Where the language is not actionable *per se*, but merely because of some local meaning which is attached to it, the declaration must affirmatively allege the import of the language at the time and place of use. (Miles *v.* Van Horn, 17 Ind. 245.)

sufficient.[1] The omission to set forth a translation may be rectified by an amendment.[2] On a general denial, the plaintiff must prove the correctness of the translation, but its correctness is admitted by a demurrer.[3] To allege a publication of English words, and prove a publication of words in another tongue, is a variance,[4] and cause for a nonsuit.[5]

§ 331. The object, or one of the objects, of obliging a plaintiff to set forth in his complaint the very words complained against, is, that the defendant may, if he desires it, by demurring, have the opinion of the court upon the actionable quality of the words.[6]

§ 332. One supposed exception to the rule now under consideration is said to be, when the words published are so obscene as to render it improper that they should appear upon the record, and in such case the statement of the words may be omitted altogether, and a description substituted; but the reason for not setting forth the exact words must appear by proper averments on the face of the complaint.[7]

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[1] Wormouth *v.* Cramer, 3 Wend. 394; Lettman *v.* Ritz, 3 Sandf. 734; Zeig *v.* Ort, 3 Chand. 26; K. *v.* V., 20 Wis. 239; Kerschbaugher *v.* Slusser, 12 Ind. 453; Hickley *v.* Grosjean, 6 Blackf. 351; Rahauser *v.* Schwerger, 3 Watts, 28; Simonsen *v.* Herold Co. 61 Wis. 626; Pelzer *v.* Benish, 67 Wis. 291.

[2] Zenobio *v.* Axtell, 6 T. R. 162; Rahauser *v.* Schwerger, 3 Watts, 28; Jenkins *v.* Phillips, 9 C. & P. 766. An amendment was allowed by inserting the foreign words. (Deboux *v.* Lehind, 1 Code Rep. N. S. 235; see Variance.)

[3] Hickley *v.* Grosjean, 6 Blackf. 351.

[4] Keenholts *v.* Becker, 3 Denio, 346; Kerschbaugher *v.* Slusser, 12 Ind. 453. "As the article was published in German, and the defendant denies the correctness of the translation, the denial of the answer that the article charges to the tenor and effect set forth in the complaint are not immaterial." Smith *v.* Ottendorfer, 3 N. Y. St. Rep. 188.

[5] Zenobio *v.* Axtell, 6 T. R. 162; Zeig *v.* Ort, 3 Chand. 26.

[6] Wood *v.* Brown, 6 Taunt. 169.

[7] Commonwealth *v.* Tarbox, 1 Cush. 66; Commonwealth *v.* Holmes, 17 Mass. 336. But see to the contrary in an indictment for blasphemy, Reg. *v.* Bradlaugh, L. R. 2 Q. B. 569; People *v.* Girardin, 1 Mason, 90; The State *v.* Brown, 1 Williams, 619. Indecent words tending only to aggravate the damages need not be repeated in the declaration. (Stevens *v.* Handley, Wright [Ohio], 121.)

§ 333. The omission to set forth in the declaration the very words published is a variance, and in the practice at common law the omission was not cured by verdict, and might be taken advantage of by motion in arrest of judgment.[1] The degree of certainty with which the defamation must be set forth depends upon the subject-matter. Where the defamation consists mainly in postures and movements, the use of language somewhat general is unavoidable; and where a declaration alleged, that the defendant published of and concerning a certain court-martial, and of and concerning the plaintiff as a member thereof, a defamatory libel and caricature, consisting of a picture representing and pointing out the court-martial, and the plaintiff as a member thereof, by their position and certain grotesque resemblances, &c., it was held, after verdict, to be averred with sufficient certainty that the plaintiff was specifically and individually libeled.[2]

§ 334. The rule now under consideration does not render it necessary to set forth the whole of the matter published; it is sufficient to set forth the particular passages complained of, provided they are divisible from, and their meaning is not affected by, the other and omitted passages.[3] It is sufficient to set out the words which are material, and additional words which do not diminish nor alter the sense of the words alleged may be omitted.[4]

[1] Gutsole *v.* Mathers, 1 M. & W. 495; Wright *v.* Clements, 3 B. & Ald. 503; and see Variance.

[2] Ellis *v.* Kimball, 16 Pick. 132; Com. *v.* Sharpless, 2 Serg. & R. 91. Judgment was arrested in an action for slander respecting a bribe, because the charge did not specify to whom the money was given. (Purdy *v.* Stacey, 5 Burr. 2698.) A declaration in slander for charging the plaintiff with larceny, held good after verdict, although it did not set forth the name of the owner of the property alleged to have been stolen by plaintiff. (Thompson *v.* Barkley, 27 Penn. St. R. 263.) It is not necessary to set forth the imputation of an offense with the same particularity as in an indictment. (*Id.*; Niven *v.* Munn, 13 Johns. 48.)

[3] Culver *v.* Van Anden, 4 Abb. Pr. Rep. 374; Rex *v.* Brereton, 8 Mod. 329; Sidman *v.* Mayo, 1 Rolle R. 429. A document referred to in an alleged libel need not be set out if it does not affect the meaning of the language complained against. (Walsh *v.* Henderson, 4 Ir. L. R. 34.)

[4] Spencer *v.* McMasters, 16 Ill. 405; Weir *v.* Hoss, 6 Ala. 881; Buckingham *v.* Murray, 2 Car. & P. 46.

But enough must be set forth to show the sense and connection in which the words set forth were used; otherwise there will be a variance, even if the precise words laid are proved to have been spoken.[1] Where several passages are extracted from the same publication, care should be taken to show that such is the case, as by prefacing the first extract, with the allegation, in a certain part of which said libel there was and is contained, &c., and by prefacing the subsequent extracts with the allegation, and in a certain other part of which said libel there was and is contained, &c.[2] But unless the insertion of the whole matter published would be oppressive and embarrassing, there is no objection to setting forth the whole of the matter published. Thus where in slander the words set out were, "*Your wife is a damned Irish woman, and has got the palsy, and your son is insane*, and you are a damned thief," the court, on motion, refused to strike out as redundant the words *in italics*.[3] In an unreported case in New York, in which the plaintiff set out, without innuendoes, the whole of the publication (nearly an entire column in a newspaper), on defendant's motion an order was made requiring the plaintiff to specify the particular passages on which he relied as defamatory.[4]

§ 335. It is an elementary rule of pleading that whatever is alleged must be alleged with certainty; and one of the means of insuring certainty in a complaint for

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[1] Edgerly *v.* Swain, 32 New Hamp. 478.

[2] Tabart *v.* Tipper, 1 Camp. 350; Cooke *v.* Hughes, 1 Ry. & M. 112.

[3] Deyo *v.* Brundage, 13 How. Pr. Rep. 221.

[4] The parts of the publication not complained of are to be taken as true, for the defendant has no opportunity of justifying them. By counsel (Cooke *v.* Hughes, Ry. & Mo. 112), I think defendant is entitled to know by plaintiff's pleading what particular portions of the article complained of are supposed to be libelous. He cannot well answer to the whole article without some definite statement of what is claimed to be its offensive parts. Something tangible should be pointed out. (Patterson, J., Prochazka *v.* Field, Feb. 1888, Supreme Court, N. Y.; Fleming *v.* Albeck, 67 Cal. 227.) A complaint setting forth several portions of an alleged libel, contains but one count. (Holmes *v.* Jones, 50 Hun, 345.)

slander or liable is an *innuendo*.[1] Among the attempts to define an innuendo and explain its function are the following: The office of an innuendo is to aver the meaning of the language published.[2] An innuendo means nothing more than the words "*id est*," "scilicet" or "*meaning*" or "*aforesaid*," as explanatory of a matter sufficiently expressed before.[3] It is in the nature of a *prædict*. It may serve for an explanation, to point a meaning where there is precedent matter, expressed or necessarily understood or known, but never to establish a new charge. It may apply what is already expressed, but cannot add to nor enlarge nor change the sense of the previous words.[4] If the words before the innuendo do not sound in slander,

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[1] Rodeburgh *v.* Hollingsworth, 6 Ind. 339. Where the language directly and in terms free from ambiguity is actionable, no innuendo is necessary. (Worth *v.* Butler, 7 Blackf. 251; Roella *v.* Follow, *Id.* 377; Bourreseau *v.* Detroit Ev. Jour. 30 No. West. Rep. 376 [Mich.].) If words are not actionable *per se*, plaintiff must aver they were intended in a particular defamatory sense, and were in fact so understood by readers and hearers. (Chamberlain *v.* Vance, 51 Cal. 75; 67 *Id.* 79.)

[2] Watson *v.* Nicholas, 6 Humph. 174. The office of the innuendo is to explain doubtful words or phrases, and annex to them their proper meaning. It cannot extend their sense beyond their usual and natural import, unless something is put upon the record by way of introductory matter with which they can be connected. In such case, words which are equivocal or ambiguous, or fall short, in their natural sense, of importing any libelous charge, may have fixed to them a meaning, certain and defamatory, extending beyond their ordinary import. (Beardsley *v.* Tappan, 1 Blatch. C. C. 588.) And to the like effect, see Dorsey *v.* Whipps, 8 Gill, 457; Nichols *v.* Packard, 16 Vt. 83; Patterson *v.* Edwards, 2 Gilman, 720; Andrews *v.* Woodmanse, 15 Wend. 232; Taylor *v.* Kneeland, 1 Douglass (Mich.), 67; Gosling *v.* Morgan, 32 Penn. St. R. 273; The State *v.* Henderson, 1 Richardson, 179; Caverley *v.* Caverley, 3 Up. Can. Rep. O. S. 338; Van Vechten *v.* Hopkins, 5 Johns. 211; Caldwell *v.* Abbey, Hardin (Ky.), 529; McCuen *v.* Ludlam, 2 Harr. 12; Beswick *v.* Chappel, 8 B. Mon. 486; Benaway *v.* Coyne, 3 Chand. 214; Vaughan *v.* Havens, 8 Johns. 109; Gompertz *v.* Levy, 1 Perr. & Dav. 214; Dodge *v.* Lacey, 2 Carter (Ind.), 212; Cramer *v.* Noonan, 4 Wis. 231; Stevens *v.* Handley, Wright (Ohio), 123. Where the charge was that plaintiff was a "bunter," without any innuendo to explain the meaning of that term, the court on the trial refused to receive evidence of the meaning, and plaintiff was nonsuited. (Rawlings *v.* Norbury, 1 Fost. & F. 341.) In Halliwell's Dictionary of Archaic Terms, "Bunter" is defined "A bad woman." (See *ante*, note 1, p. 120.)

[3] Rex *v.* Horne, 2 Cowper, 688; approved Reg. *v.* Virrier, 4 Per. & D. 161.

[4] 1 Stark. Sland. 418; Rex *v.* Greepe, 2 Salk. 513; 1 Ld. Raym. 256; 12 Mod. 139; 1 Saund. 243; Van Vechten *v.* Hopkins, 5 Johns. 220; McClaughry *v.* Wetmore, 6 Johns. 83; Thomas *v.* Croswell, 7 Johns. 271; Weed *v.* Bibbins, 32 Barb. 315.

no meaning produced by the innuendo will make the action maintainable, for it is not the nature of an innuendo to beget an action.[1] "An innuendo helps nothing unless the words precedent have a violent presumption of the innuendo."[2] The business of an innuendo is by a reference to preceding matter to fix more precisely the meaning.[3] "The office of an innuendo is to explain not to extend what has gone before, and it cannot enlarge the meaning of words, unless it be connected with some matter of fact expressly averred."[4] The innuendo "is only a link to attach together facts already known to the court."[5]

§ 336. An innuendo cannot perform the office of an inducement;[6] in other words, the want of proper inducement cannot be supplied by an innuendo.[7] The absence

[1] Barham *v.* Nethersole, Yelv. 21.

[2] Castleman *v.* Hobbs, Cro. Eliz. 428.

[3] Rex *v.* Aylett, 1 T. R. 63; Beardsley *v.* Tappan, 1 Blatch. C. C. 588; see *ante*, § 309.

[4] Patterson *v.* Edwards, 2 Gilman, 720; Van Vechten *v.* Hopkins, 5 Johns. 211. The innuendo cannot introduce new matter. (Taft *v.* Howard, 1 Chip. 275; Nichols *v.* Packard, 16 Vt. 83; Weir *v.* Hoss, 6 Ala. 881; Brown *v.* Burnett, 10 Bradw. [Ill.] 279.) Or change the ordinary meaning of language. (Hays *v.* Mitchell, 7 Blackf. 117.)

[5] Cooke on Defamation, 94.

[6] Fitzsimmons *v.* Cutter, 1 Aik. 33; The State *v.* Henderson, 1 Richardson, 179; Lindsey *v.* Smith, 7 Johns. 359; Ward v. Colyhan, 30 Ind. 396; The State *v.* Atkins, 42 Vt. 252; Stitzell *v.* Reynolds, 59 Penn. 488; Emery *v.* Prescott, 54 Me. 389; Patterson *v.* Wilkinson, 55 Me. 42; Beardsley *v.* Tappan, 1 Blatch. C. C. 588.

[7] Church *v.* Bridgman, 6 Mo. 190; Milligan *v.* Thorn, 6 Wend. 412; Sayre *v.* Jewett, 12 Wend. 135; Hawkes *v.* Hawkey, 8 East, 427; Joralemon *v.* Pomeroy, 22 New Jersey, 271. The words, "Thereby accusing the plaintiff of stealing," in a declaration, immediately following words alleged to have been spoken, which do not of themselves amount to a charge of larceny, without any precise *colloquium* or averment showing such to have been the intention, are not sufficient to make the declaration good. (Brown *v.* Brown, 2 Shep. 317.) Where, in an action for slander, the declaration alleged that the defendant had said of the plaintiff that he had set fire to his own premises, innuendo that plaintiff had been guilty of willfully setting fire to the premises which, whilst in his occupation, had been destroyed by fire, it was held, on motion in arrest of judgment, that the court could not after verdict presume that the jury had found that defendant meant to impute to plaintiff that he had done it unlawfully or feloniously, as well as willfully. (Sweetapple *v.* Jesse, 2 Nev. & M. 36; 5 B. & Adol. 27.) In slander, the declaration stated that the plaintiff was a justice of the peace, and that the defendant, meaning to injure and expose him to prosecution for corruption, &c., in a certain discourse, &c., said to the plaintiff, in his office of justice: "L. (meaning the plaintiff) had been feed by A. W. (meaning A. W., who lately had a cause pending and determined before

of *inducement*, showing by extrinsic matter that the words charged are actionable, is not supplied by an innuendo attributing to those words a meaning which renders them actionable.[1] Words not in themselves actionable, cannot be rendered so by an innuendo, without a prefatory averment of extrinsic facts, which makes them slanderous.[2] If the words charged do not imply a criminal charge, subject to infamous punishment, an innuendo will not help them; but when they are used in a double sense, the plaintiff may, by an innuendo, aver the meaning with which he desires it to be understood they were spoken, and the jury may find whether they were spoken with that meaning or not.[3]

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the plaintiff), and that he (the defendant meaning) could do nothing when the magistrate was in that way against him (the defendant meaning)." After verdict, the declaration was held sufficient. (Burtch *v.* Nickerson, 17 Johns. 217.) Where the words in themselves were such as were usually applied to the keeper of a gambling house, and obviously imputed to the plaintiff fraudulent and dishonorable conduct; held, that the declaration might be supported, although the words might not be capable, by innuendo, of being referred to any particular malpractice. (Digby *v.* Thompson, 1 Nev. & M. 485.) An averment in a declaration that the defendant had spoken of and concerning the plaintiff, these words: "N. (meaning the plaintiff) burnt it (meaning the store), and he (meaning the plaintiff) knew it, and I (meaning the defendant) can prove it," preceded by a *colloquium* that the words were spoken of and concerning the burning of a store owned by the defendant, and followed by an averment that the words were intended to charge the plaintiff with a felonious burning, &c., was held sufficient. (Nichols *v.* Packard, 16 Vt. 83.)

[1] Holton *v.* Muzzy, 30 Vt. (1 Shaw), 365; Bell *v.* Sun Print. & Pub. Co. 3 Abb. N. C. 157; 42 N. Y. Superior Ct. 567.

[2] Watts *v.* Greenleaf, 2 Dev. 115; see Brown *v.* Brown, 2 Shep. 317; Harris *v.* Burley, 8 N. Hamp. 256; Beswick *v.* Chappel, 8 B. Monr. 486; Dottarer *v.* Bushey, 16 Penn. 204; Moseley *v.* Moss, 6 Gratt. 534; Watson *v.* Hampton, 2 Bibb. 319; Hall *v.* Blandy, 1 You. & Jer. 480; Ramscar *v.* Gerry, 16 N. Y. St. Rep. 789. A declaration containing words which, in common understanding, would import the crime against nature, preceding them with an averment that they were intended to charge the plaintiff with that crime, and following them with an averment that they were so understood, is good. (Goodrich *v.* Woolcot, 3 Cow. 231; affi'd 5 Cow. 714.)

[3] Dottarer *v.* Bushey, 16 Penn. St. Rep. (4 Harris), 204. Words which do not necessarily import criminality are in pleading rendered actionable only by reference to extrinsic facts which show them to have been used in an obnoxious sense. (Pittsburg R'y Co. *v.* McCurdy, 114 Penn. St. R. 554.) A charge that "Byerly (plaintiff) had taken apples or had stolen apples out of Borland's orchard" held equivocal as meaning either a trespass or a larceny, which required matter of inducement to determine, and that the want of inducement was not supplied by an innuendo. (Lukehart *v.* Byerley, 53 Penn. St. 418; and see Pittsburg, &c. *v.* McCurdy, 6 Cent. Rep. 719; 114 Penn. St. 554.)

Thus, where the charge was that the plaintiff lived by swindling and robbing the public, here the language might mean either fraud or felony. The plaintiff, in his declaration, alleged that it meant to charge him with being guilty of felony and robbery. On the trial it was held to impute only a charge of fraud, and as a charge of fraud is not actionable *per se*, the plaintiff failed in his action.[1]

§ 337. An innuendo cannot *extend* the meaning of defamatory matter, unless by reference to matter of inducement. The innuendo must be supported by the inducement.[2] Where there was no inducement, and the allegation was, "T. Barham (the plaintiff) hath burnt my barn (meaning my barn at that time full of corn);" after verdict for the plaintiff, judgment was arrested, because to burn the barn was only a trespass, and the innuendo meaning a barn full of corn, extended the signification of the word *burn*, and was unwarranted.[3] It should have been averred that the plaintiff had a barn full of corn, and that in a conversation about that barn, the defendant had spoken the words charged; then the innuendo that the barn meant "my barn full of corn," would have been good. In libel, an innuendo imputing to the plaintiff larceny of plants and

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[1] Smith *v.* Carey, 3 Camp. 461. D. killed my beef, cannot be extended by innuendo to impute a felony. (Hansborough *v.* Stinnett, 25 Gratt. 495.) Forsworn must be explained by inducement to make it actionable. (Pittsburg, &c. *v.* McCurdy, 6 Cent. Rep. 721; see *post*, § 338.)

[2] Taylor *v.* Kneeland, 1 Doug. (Mich.) 67; The State *v.* Henderson, 1 Rich. 179; Stucker *v.* Davis, 8 Blackf. 414; Sanderson *v.* Caldwell, 45 N. Y. 398. A judgment in slander will not be arrested because an innuendo enlarges the natural meaning of the words spoken. (Shultz *v.* Chambers, 8 Watts, 300; Solomon *v.* Lawson, 8 Q. B. 823.) But if rejecting the innuendo as surplusage, the words are not actionable *per se*, judgment must be arrested. (Barham *v.* Nethershall, Yelv. 22; 4 Co. 20; Gainsford *v.* Blatchford, 7 Price, 544; 6 Price, 36.)

[3] Barham *v.* Nethershall, Yelv. 21; Frank *v.* Dunning, 38 Wis. 270. I saw Peter (plaintiff) with or at a heifer; innuendo committing sodomy; after verdict for plaintiff, judgment arrested, because innuendo not warranted. (Johnson *v.* Hedge, 6 Up. Can. Q. B. Rep. 337.) He (plaintiff) sheared two of Zack Austin's sheep and kept the wool, with an innuendo but no colloquium, held not sufficient to show a cause of action. (Brown *v.* Piner, 6 Ky. [Bush.] 518.)

flowers of the defendant, and motion in arrest of judgment, on the ground that larceny could not be committed of flowers, and so the innuendo was too large; it was held sufficient after verdict, as the term *flowers* must be taken to have meant such flowers as were capable of being the subject of larceny, by being detached or otherwise.[1] And where the language of the plaintiff, as clerk of a company, was, "You have done many things with the company for which you ought to be hanged, and I will have you hanged before," &c.; and there was an *innuendo* that the plaintiff had been guilty of felonies punishable by law with death by hanging; on motion in arrest of judgment, it was held sufficient.[2] The word forsworn cannot by an innuendo alone be interpreted perjury. Thus, where the allegation was, "John Holt (meaning the plaintiff) had forsworn himself (meaning that the plaintiff had committed willful and corrupt perjury);" after verdict for the plaintiff judgment was arrested, because the innuendo was unwarranted by an inducement.[3] In slander, the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him by the defendant in the Court of Exchequer, but did not proceed to aver any colloquium respecting that answer, with reference to which the words

[1] Gardiner *v.* Williams, 2 Cr. M. & R. 78; 3 Dowl. Pr. Cas. 796. In this case, one of the counts set forth the following passage of a letter from the defendant to one P.: "I have reason to suppose that many of the flowers of which I have been robbed are growing upon your premises (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had unlawfully disposed of them to P., and unlawfully placed them in P.'s garden)." The previous part of the letter stated that the plaintiff, whom P. had taken into his employ as a gardener, had been in the defendant's employ in the same capacity, and had been discharged for dishonesty; held, on error, that the innuendo was not too large. (1 M. & W. 245.)

[2] Francis *v.* Roose, 3 M. & W. 191. Where the words were: "We are requested to state that the secretary of the Tichborne Defense Fund is not, and never was, a captain in the Royal Artillery;" innuendo that plaintiff was an imposter, and fraudulently represented himself as a captain —held that the innuendo was not warranted. (Hunt *v.* Goodlake, 29 Law Times, N. S. 472; 43 Law Jour. Rep. N. S. C. P. 54.)

[3] Holt *v.* Scholefield, 6 Term R. 691.

were spoken; and then alleged that the defendant said of him that he was forsworn; innuendo that the plaintiff had perjured himself in what he had sworn, in his aforesaid answer to the said bill; held, that this innuendo could not, without the aid of such a colloquium, enlarge the sense of the words by referring them to the answer averred in the prefatory part of the declaration to have been put in.[1] Where the declaration only alleged the intention to impute misconduct, and that the defendant maliciously published a notice, "That any person giving information where property belonging to the plaintiff, a prisoner in the King's Bench prison, might be found, should receive five per cent. on the goods recovered," an innuendo that thereby the plaintiff had been guilty of concealing his property, with a fraudulent and unlawful intention, was held bad, on demurrer, as enlarging the meaning of the terms used.[2] In an action for a libel, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning thereby the said Lord Lieutenant of Ireland), if he knew anything about the country, or was not under the spell of vile and treacherous influences, to make his first visit, and that carefully puffed, to Long's, the coach-maker (meaning thereby the said plaintiff), the other day? If mere trade was his (meaning thereby the said Lord Lieutenant's) object, he had several respectable houses open to him (meaning thereby that the house and place of business of the said plaintiff was not respectable, and that the said visit was paid thereto for political objects)." *Held*, that the innuendo did not enlarge the sense of these words, which were fully capable of the meaning given to them.[3] And where the declaration stated that the plaint-

[1] Hawkes *v.* Hawkey, 8 East, 427.

[2] Gompertz *v.* Levy, 1 Perr. & Dav. 214.

[3] Barrett *v.* Long, 3 Ho. of Lords Cas. 395. Where the declaration alleged that plaintiffs, A. and B., were husband and wife, and that defendant alleged that the female plaintiff was the wife of one C., innuendo that B. had been guilty of bigamy—held that the innuendo was warranted. (Heming *v.* Power, 10 M. & W. 564.)

iff was a trader, and employed by the board of ordinance to relay the entrance to their office with new asphalt, and that the defendant falsely said of him in his said trade, and in reference to the work: "The old materials have been relaid by you in the asphalt work executed in front of the ordnance office, and I have seen the work done." Innuendo that the plaintiff had been guilty of dishonesty in the conduct of his said trade, by laying down again the old asphalt which had been before used at the entrance of the ordnance office, instead of new asphalt, according to his contract. *Held*, on motion to arrest the judgment, that the declaration was sufficient, and the innuendo was not too large, as it put no new sense on the words, but only imputed intention to the speaker.[1] Where the words set forth were, that A. was murdered, and the plaintiff was concerned in it and had a hand in it, innuendo meaning that the plaintiff aided and assisted in the commission of the murder, it was held to be sufficient.[2] The first count of a declaration charged the speaking these words of and concerning the plaintiff: "You are a bloody thundering thief, and all your family. I can prove you and them to be thieves. I can prove you (meaning plaintiff) to go down the river (meaning the river Thames) with ships of eight feet water (meaning ships drawing eight feet water), charging the owners for ten feet, &c.; and you (meaning plaintiff) are obliged to move from one parish to another (meaning thereby that the plaintiff was guilty of dishonesty, and of charging more for the pilotage of certain ships than he was by law entitled to do)." *Held*, that the words were actionable without any innuendo, but that those put were proper.[3] "I have heard that a maid

[1] Barbanneau *v.* Farrell, 15 C. B. 360; 24 Law J. Rep. (N. S.) C. P. 9; 1 Jur. N. S. 114.

[2] Tenney *v.* Clement, 10 N. Hamp. 52.

[3] Simpsey *v.* Levy, 2 Jurist, 776. Although an innuendo cannot enlarge the real sense of the words, yet if, under the circumstances stated in the declaration, the meaning which is alleged can be reasonably imputed to them, then the allegation of such

of Sir J. K.'s should report, that he being sick, and she looking through a hole of the door, saw a *priest* (innuendo *a popish priest*) give the eucharist and extreme unction;" . . . and "saw a popish priest *anoint* (innuendo *extreme unction*) him." *Held*, after verdict, that *priest* was rightly construed *popish priest*, and *anoint* was rightly construed *extreme unction*.[1] Where the words charged as libelous were, "Who was deprived of a two-penny justiceship, for malpractice in packing a jury," and they were explained, by an innuendo, as meaning "that the plaintiff had packed a jury, and had been guilty of malpractice in packing a jury," it was held that the innuendo was warranted by the words charged.[2]

§ 338. Where language is ambiguous and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out *the meaning* which the plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. This applies whether the ambiguity be patent or latent (§ 128),[3] and whether or not there are any facts alleged as inducement.[4] By this means the defendant is informed of the precise charge he has to meet, and to deny or justify; but the plaintiff is subjected to the risk that if he claims for the language a meaning which is not the true one, or one which he is unable to make out satisfactorily, he may be

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meaning is strictly the proper function of the innuendo. (Ganet *v.* Babbitt, 1 Bradw. [Ill.] 130; Petsch *v.* St. Paul Dispatch Print. Co. 41 No. West. Rep. 1034 [Minn.].)

[1] Knightly *v.* Marrow, 3 Lev. 68.

[2] Mix *v.* Woodward, 12 Conn. 262. In an action for slander, the innuendoes "meaning to insinuate and falsely represent," "meaning to insinuate and be understood," or "meaning and intending to represent," "that the plaintiff had stolen the money aforesaid," indicate that the defendant's charge against the plaintiff was that he had stolen the money, and therefore was sufficient. (Hoyt *v.* Smith, 32 Vt. [3 Shaw], 304.)

[3] Griffiths *v.* Lewis, 8 Q. B. 841; 7 *Id.* 67; Joralemon *v.* Pomeroy, 2 New Jer. 271; Watson *v.* Nicholas, 6 Humph. 174. But "it is not allowable to interpret what has no need of interpretation." (McCluskey *v.* Cromwell, 11 N. Y. 601; and *ante*, note p. 111.)

[4] Clegg *v.* Laffer, 3 Moo. & Sc. 727; 10 Bing. 350; Williams *v.* Stott, 1 C. & M. 675; Smith *v.* Carey, 3 Camp. 461.

defeated on the ground of *variance* or *failure of proof*. For when the plaintiff, by his innuendo, puts a meaning on the language published, he is bound by it, although that course may destroy his right to maintain the action;[1] as where the alleged slander was that "Mrs. B.'s time has come around (innuendo that the usual period of parturition had arrived), and he (plaintiff) is down there getting a child away from her. He is procuring an abortion upon her." It was held that but for the interpretation the plaintiff had, by the innuendo, put on the words "her time has come around," the words were actionable, but with that meaning they were not actionable, and plaintiff was bound by the interpretation he had himself supplied.[2] And so where the plaintiff alleged that he was treasurer and collector of certain tolls, and that defendant published of him (plaintiff), as such treasurer and collector, "You are gathering the toll for your own pocket," innuendo that plaintiff, being such treasurer and collector, was guilty of

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[1] Wharton *v.* Gearing, 1 Vict. Law Rep. L. 122.

[2] Butler *v.* Wood, 10 How. Pr. R. 222. When, at the close of the trial, the plaintiff claimed and obtained a verdict upon a meaning different from that pointed by his innuendo, a new trial was granted, on the ground of surprise upon the defendant. (Hunter *v.* Sharpe, 4 Fost. & F. 983; see Day *v.* Robinson, 1 Adol. & El. 554; note to § 144, subd. *z*, *ante;* Gompertz *v.* Levy, 9 A. & E. 282; and Smith *v.* Carey, 3 Camp. 461; Strader *v.* Snyder, 67 Ill. 404; *ante*, § 336. Where the words were actionable *per se*, and there was an innuendo giving them a meaning of which they were capable, and the jury found upon distinct issues (1) that the words were libelous, and (2) that the words did not have the meaning imputed by the innuendo, held that the innuendo could not be rejected to enable plaintiff to have a verdict upon another construction of the words. (Maguire *v.* Knox, Ir. Rep. 5 Com. Law, 408; Ruel *v.* Tatnel, 43 Law Times, N. S. 507.) In this latter case plaintiff alleged in his statement of claim, that defendant falsely and maliciously spoke of plaintiff the words: "His shop is in the market," meaning thereby that plaintiff was going away, and was guilty of fraudulent conduct in his business, inasmuch as he had received subscriptions from members of a certain club, well knowing that they would be unable to obtain any benefit therefrom. Held, that the words not being themselves defamatory, and there being no evidence to wholly support the innuendo, the defendant was entitled to judgment. (See *post*, § 372; and *ante*, p. 136 n. 2.; and as to rejecting the innuendo see § 344, *post*.) In Watkin *v.* Hall (Law Rep. 3 Q. B. 396), plaintiff failed to establish the meaning imputed by the innuendo, and was allowed to recover on another meaning. But this was justified under the Common Law Procedure Act of 1852. (And see Brembridge *v.* Latimer, 12 Week. Rep. 878.)

collecting tolls to improperly apply them to his own use; on the trial, the plaintiff having proved that he was treasurer only, and not collector, the variance was considered fatal, and the plaintiff was nonsuited; for the words were applicable to the plaintiff rather in his character of collector than treasurer, and the plaintiff was bound to prove the words applicable to the plaintiff in the manner which he himself had pointed out by innuendo.[1]

§ 339. If the innuendo consists of two distinct allegations, which can be separated without destroying the sense of either of them, and one of them is and the other is not warranted by the alleged libelous matter, the latter may be rejected, and the count will be valid.[2] Therefore, in an action of slander, where the words alleged to have been spoken clearly charged the killing of a horse, and the innuendo was that the defendant intended to charge the plaintiff with arson, it was held that the innuendo might be stricken out, and the declaration sustained upon the charge of killing the horse.[3]

§ 340. The following innuendos were held to be proper, without any inducement to support them: Bishops, innuendo Bishops of England;[4] Ministers, innuendo the Ministers of the King of England;[5] The Navy, innuendo the Royal Navy of this Kingdom;[6] Chevalier, innuendo the Pretender;[7] Little Gentleman on the other side of the water, innuendo the Prince of Wales;[8] Door, innuendo The Outer Door;[9] Death, innuendo Murder;[10] His, innuendo the defendant's;[11] mere man of

[1] Sellers *v.* Till, 4 B. & C. 655; see *ante*, note 5, p. 549.
[2] Barrett *v.* Long, 8 Ir. Law Rep. 331.
[3] Gage *v.* Shelton, 3 Rich. 242.
[4] Baxter's Case, 3 Mod. 69.
[5] Anon. 11 Mod. 99.
[6] Tutchin's Case, 5 State Trials, 590.
[7] Rex *v.* Matthews, 9 State Trials, 682.
[8] Anon. 11 Mod. 99.
[9] Rex *v.* Aylett, 1 T. R. 63.
[10] Oldham *v.* Peake, 2 W. Black. 959.
[11] Muck's Case, 8 Mod. 30. Filly horse, innuendo the plaintiff's wife, his name being Hoss. (Weir *v.* Hoss, 6 Ala. 881; and see *ante*, note 2, p. 113.)

straw, innuendo he was insolvent.[1] M. G. (the plaintiff's son and servant) uses two balls to his mother's steelyard, innuendo that plaintiff, by M. G. as her servant, used fraudulent weights, and cheated in her trade.[2]

§ 341. The following innuendos were held to be unwarranted, there being no inducement to support them: Thomaston, innuendo the State prison situate in the town of Thomaston;[3] He fired his house, innuendo he voluntarily fired his house;[4] She is sick, innuendo she has had a child;[5] Tan-money, innuendo money the produce of the sale of tan;[6] She is a bad girl, innuendo a prostitute;[7] Public house, innuendo a bawdy-house;[8] Thou hast stolen half an acre of my corn, innuendo the corn growing upon half an acre of ground reaped and put into shocks by the defendant;[9] You are a regular prover under bankruptcies, innuendo that plaintiff was accustomed to prove fictitious debts under commissions of bankruptcy;[10] He had corn from B.'s barn, innuendo that he had stolen corn from B.;[11] My landlord, innuendo the plaintiff;[12] Thy father, innuendo the plaintiff;[13] Thy son, innuendo the plaintiff;[14] He

[1] Eaton *v.* Johns, 1 Dowl. Pr. Cas. N. S. 602. He has become so inflated with self-importance by the few hundreds made in my employ, God only knows whether honestly or otherwise (innuendo that plaintiff had conducted himself dishonestly in the service of defendant); held the innuendo was justified. (Clegg *v.* Laffer, 3 Mo. & Sc. 727.)

[2] Griffiths *v.* Lewis, 8 Q. B. 841.

[3] Emery *v.* Prescott, 54 Maine, 389.

[4] Anon. 11 Mod. 220.

[5] Smith *v.* Gaffard, 33 Ala. 108.

[6] Day *v.* Robinson, 1 Ad. & Ell. 554.

[7] Snell *v.* Snow, 13 Metc. 278. Bitch cannot by innuendo be made to impute whoredom. (Schurick *v.* Kollman, 50 Ind. 336.)

[8] Dodge *v.* Lacey, 2 Cart. 212; *ante*, note 5, p. 140. And so of "bad house." (Peterson *v.* Sentman, 37 Md. 140.)

[9] Castleman *v.* Hobbs, Cro. Eliz. 428.

[10] Alexander *v.* Angle, 1 Tyrw. 9; 1 C. & J. 143; 7 Bing. 119; 4 M. & P. 870.

[11] Wheeler *v.* Haynes, 1 Perr. & Dav. 55; 9 Adol. & Ell. 286, note; Harvey *v.* French, 2 Moo. & S. 591.

[12] 1 Starkie on Slander, 386.

[13] Badcock *v.* Atkins, Cro. Eliz. 416; Phelps *v.* Lane, Cro. Car. 92.

[14] Shalmer *v.* Foster, Cro. Car. 176. But see Wiseman *v.* Wiseman (Cro. Jac. 107), where it was alleged the defendant spoke the words *de præfato querente existente fratre suo naturali*, and adjudged for plaintiff. Where the description may apply to one of a class, as brothers or sons, it is unnecessary for the plaintiff to aver that he is the only brother or only son. (1 Starkie on Sland. 388; see *ante*, note 1, p. 553.)

lost no time in transferring himself, together with £—— of John Bull's money, to Paris, where he now out-tops princes in his style of living, innuendo that the plaintiff had thereby *cheated* John Bull.[1]

§ 342. Evidence cannot be introduced to support or explain an innuendo.[2] "I never knew an innuendo offered to be proved."[3] Its truth must always appear from precedent averments.[4] An issue cannot be raised upon the truth of an innuendo.[5] Where an averment or colloquium introduces extrinsic matter into a complaint, that is proper subject of proof.[6] Whether the language is *capable* of bearing the meaning assigned by the innuendo, is for the court; whether the meaning is *truly* assigned to the language, is for the jury.[7]

§ 343. Where the language is not in itself applicable to the plaintiff, no innuendo can make it so.[8] But where the matter published on its face appears to apply to a class

[1] Yrisarri *v.* Clement, 3 Bing. 432. Society of guardians for the protection of trade against swindlers and sharpers. I (defendant) am directed to inform you that A. B. (plaintiff) and C. D. are reported to this society as improper to be proposed to be balloted for as members thereof; innuendo that plaintiff was a swindler and sharper, held not warranted. (Goldstein *v.* Foss, 6 B. & Cr. 154.) Action by a conductor against his employers for posting a notice that plaintiff "had been discharged for failing to ring up all fares collected;" innuendo that he had been guilty of embezzlement; held innuendo not warranted. (Pittsburg A. & M. R'y Co. *v.* McCurdy, 114 Penn. St. 554.)

[2] The State *v.* Henderson, 1 Richardson, 179; Van Vechten *v.* Hopkins, 5 Johns. 211; Gidney *v.* Blake, 11 Johns. 54; see Johnson *v.* McDonald, 2 Up. Can. Q. B. Rep. 209.

[3] Pollexfen arg. Rosewell's Case, 3 State Trials, 1058, admitted by court and opposite counsel, cited and approved Van Vechten *v.* Hopkins, 5 Johns. 226; and see Fry *v.* Bennett, 5 Sandf. 66; Blaisdell *v.* Raymond, 4 Abb. Pr. Rep. 454.

[4] Taylor *v.* Kneeland, 1 Douglass (Mich.), 67. Innuendo cannot be aided by opinion of witness. (Rangler *v.* Hummel, 1 Wright, 130; Pittsburg A. & M. R'way Co. *v.* McCurdy, 114 Penn. St. 554.)

[5] Fry *v.* Bennett, 5 Sandf. 54; Commonwealth *v.* Snelling, 15 Pick. 335. Justifying an innuendo, see Biggs *v.* Gt. East. R. R. (16 Weekly Rep. 908). An innuendo may in some cases justify a demurrer. (Fry *v.* Bennett, 5 Sandf. 54.)

[6] Van Vechten *v.* Hopkins, 5 Johns. 24.

[7] Blagg *v.* Stuart, 10 Q. B. 899; Broome *v.* Gosden, 1 C. B. 728; Barrett *v.* Long, 3 House of Lords Cas. 395; Barbanneau *v.* Farrell, 15 C. B. 360; Hemmings *v.* Gason, 5 Ir. Law Rep. 498.

[8] See in note to § 131, *ante;* and §§ 310, 316, 375*a*.

of individuals, the plaintiff may, by an innuendo, show that the publication applied to him; that is not extending the sense of the matter. Therefore, where the declaration alleged that the plaintiff was owner of a factory in Ireland, and charged that the defendant published of him and of the said factory a libel, imputing that, "in some of the Irish factories" (meaning thereby the plaintiff's) "cruelties were practiced," though there was no allegation otherwise connecting the libel with the plaintiff, was, after verdict, held good.[1] If the plaintiff is designated by another name in the libel, his real name may be designated by inducement and an *innuendo*.[2] In libel the plaintiff averred that she was the mother of one Edward J. Barker, and that defendant, knowing this, to defame her, published "of the Barkers—that was the name of his reputed father, what was his mother's I either never knew or have forgot, but I know it was not Barker," innuendo that plaintiff was the mother of an illegitimate child, on demurrer held that the declaration was good.[3] A count in libel, after averring that a sum of money was standing in the Bank of England, at the time of the death of one W. T., in his name, alleged that the defendant published concerning the plaintiff, and concerning such money, the following libel: "There

[1] Le Fanu *v.* Malcomson, 1 House of Lords Cas. 637; 13 Law Times, 61; Parker *v.* Raymond, 3 Abb. Pr. Rep. N. S. 343; Marsden *v.* Henderson, 22 Up. Can. Q. B. Rep. 585. There needs no innuendo when the words are spoken to the plaintiff himself. (2 Rolle Rep. 243.) "You have bewitched my mare," innuendo the mare of the *plaintiff* instead of the *defendant*, held good after verdict. (Smith *v.* Cooker, Cro. Car. 512; but see *ante*, note 4, p. 552.)

[2] Hays *v.* Brierly, 4 Watts, 392. "Mr. Deceiver" (meaning the plaintiff), held good on writ of error. (Fleetwood *v.* Curle, Cro. Jac. 557.) The following was held sufficient to point out the plaintiff: "This diabolical character, like Polyphemus, the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain circumnavigator," meaning to allude to the plaintiff's name. (J'Anson *v.* Stuart, 1 T. R. 748.) A declaration in slander, which, averring a colloquium concerning the plaintiff and A., charged the defendant with saying that A. thinks it a hard matter to commit fornication with "his niece" (meaning the plaintiff), was held sufficient, without an averment that the plaintiff was A.'s niece. (Miller *v.* Parish, 8 Pick. 384.)

[3] Anderson *v.* Stewart, 8 Up. Can. Q. B. Rep. 243; and see *ante*, note 14, p. 575.

is strong reason for believing that a considerable sum of money was transferred from Mr. T.'s (meaning the said W. T.'s) name in the books of the Bank of England, by power of attorney obtained from him by undue influence, after he became mentally incompetent to perform any act requiring reason and understanding" (thereby meaning that the plaintiff had transferred, or caused to be transferred, the said money from the said W. T.'s name in the said books of the said bank, by means of a power of attorney obtained by him from the said W. T., by undue influence exercised by him over the said W. T., at a time when the said W. T. had become mentally incompetent to give a power of attorney, and to perform any act requiring reason and understanding). Held, after verdict for plaintiff, on motion in arrest of judgment, that the libel was sufficiently shown to point to the plaintiff.[1] Averments were introduced into the declaration of words spoken by the defendant imputing dishonesty to L., the name of L. being followed by the innuendo, "meaning the plaintiffs' agent and clerk," but there was nothing else in the declaration showing any connection between L. and the plaintiffs. Held, that in the absence of a direct averment connecting L. with the plaintiffs or their business, the words alleged to have been spoken concerning them were not actionable in favor of the plaintiffs.[2] Where the alleged libel consisted of a passage in a newspaper warning certain persons to avoid the traps laid for them by desperate adventurers, innuendo the plaintiff amongst others, was, *after verdict*, held sufficiently to point out the plaintiff.[3] Where there was no colloquium that the defamatory matter was concerning the justices of Suffolk, and it did not appear on the face of the alleged libel that it applied to such justices, it

[1] Turner *v.* Merrywether, 13 Jur. 683; 18 Law Jour. C. P. 155; 12 Law Times, 474.

[2] Smith *v.* Hollister, 32 Vt. (3 Shaw), 695.

[3] Wakley *v.* Healey, 18 Law Jour. 241, C. P.

was held that the defamatory matter could not be connected with or applied to such justices by means of an innuendo.[1]

§ 344. If a complaint is sufficient without the innuendo, the innuendo may be rejected as surplusage;[2] the innuendo may always be rejected when it merely introduces matter not necessary to support the action,[3] or when it is incongruous,[4] or too broad;[5] an innuendo that the attorney general spoken of meant the attorney general for the county palatine of Chester was so rejected.[6] It follows from the foregoing that if the language is actionable *per se*, the attributing by innuendo, an unwarranted meaning, will not render the complaint demurrable.[7]

§ 345. Special damages, or those damages which are not the necessary consequence of the language complained of (§§ 197–202), must be specially alleged in the complaint, or the plaintiff will not be allowed on the trial to go into evidence to prove such damages.[8] Where the

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[1] Rex *v.* Alderton, Sayre, 280; and to the like effect, Hawkes *v.* Hawkey, 8 East, 427; Savage *v.* Robery, 5 Mod. 398; 2 Salk. 694.

[2] Commonwealth *v.* Snelling, 15 Pick. 335; Moseley *v.* Moss, 6 Gratton, 534; Cooper *v.* Greeley, 1 Denio, 360; Harvey *v.* French, 1 Cr, & M. 11; affirmed 2 Mo. & Sc. 591; Gage *v.* Shelton, 2 Rich. 242; Giles *v.* The State, 6 Ga. 276; Gabe *v.* McGinness, 68 Ind. 538; Kraus *v.* The Sentinel, 62 Wis. 660; see § 338, *ante*.

[3] Thomas *v.* Crosswell, 7 Johns. 264; Crosswell *v.* Weed, 25 Wend. 621; Carter *v.* Andrews, 16 Pick. 1; Carroll *v.* White, 33 Barb. 621; Hudson *v.* Garner, 22 Mo. 423; Rodebaugh *v.* Hollingsworth, 6 Ind. 339.

[4] Gardiner *v.* Williams, 2 Cr. M. & R. 78; 3 Dowl. Pr. Cas. 796.

[5] Benaway *v.* Conyne, 3 Chand. (Wis.) 214; Barrett *v.* Long, 3 Ho. of Lords Cas. 395.

[6] Roberts *v.* Camden, 9 East, 93; and see Robinson *v.* Day. 2 Nev. & M. 670; West *v.* Smith, 4 Dowl. 703.

[7] Kraus *v.* The Sentinel Co. 62 Wis. 600; Dwyer *v.* Macartney, 3 Vict. Law Rep. L. 296. As to being bound by the innuendo, see note 2, p. 573, *ante*.

[8] Squier *v.* Gould, 14 Wend. 159; Strang *v.* Whitehead, 12 *Id.* 64; Roberts *v.* Roberts, 5 B. & S. 385; Kelly *v.* Huffington, 3 Cr. C. C. 81; Birch *v.* Benton, 26 Mo. (5 Jones), 155; Johnson *v.* Robertson, 8 Porter, 486; Barnes *v.* Trundy, 31 Maine (1 Red.), 321; Bostwick *v.* Nicholson, Kirby, 65; Bostwick *v.* Hawley, *Ib.* 290; Shipman *v.* Burrows, 1 Hall, 399; Harcourt *v.* Harrison, *Ib.* 474; Geare *v.* Britton, Bull. N. P. 7; Wilson *v.* Runyon, Wright, 651; Bassil *v.* Elmore, 65 Barb. 627. Nor to give evidence of a general loss of reputation. (Herrick *v.* Lapham, 10 Johns. 281.) A complaint for words in writing charging insanity need not allege special damage. (Perkins *v.*

language is actionable *per se*, special damage need not be alleged;[1] but if the language is not actionable *per se*, special damage must be alleged.[2] Allegations of special damage are not traversable. They are inserted in the complaint to apprise the defendant of what he must be prepared to rebut on the trial.[3] Where the declaration set forth that the plaintiff was a ship-master, the words defaming him as such, and that, by reason of the same, "certain insurance companies in the city of New York refused to insure any vessel commanded by him, or any goods laden on board any vessel by him commanded;" *Held*, that the allegation was too general, and that proof could

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Mitchell, 31 Barb. 461.) So in an action by one of several partners. (Robinson *v.* Marchant, 7 Q. B. 918.) But in such an action damage to plaintiff individually must be shown. (Havermeyer *v.* Fuller, 10 Abb. N. C. 9.) In an action for defaming one in his trade no allegation of special damage is necessary. (Ingram *v.* Lawson, 6 Bing. N. C. 212; Foulger *v.* Newcomb, 36 Law Jour. Ex. 169; Butler *v.* Howes, 7 Cal. 87.) In such cases the occupation supplies the place of special damage. (*Ante*, note 1, p. 223.) In action for slander of title special damage must be alleged. (Gordon *v.* McGibbon, 3 Pug. N. B. 49; Wilson *v.* Dubois, 35 Minn. 471.)

[1] Hicks *v.* Walker, 2 Greene (Iowa), 440; Montgomery *v.* Knox, 23 Fla. 595. Where the language is actionable *per se*, special damage, although alleged, need not be proved. (Cook *v.* Field, 3 Esp. Cas. 133; Kelly *v.* Huffington, 3 Cranch C. C. 81; Smith *v.* Ottendorfer, 3 N. Y. St. Rep. 187.)

[2] Achorn *v.* Piper, 66 Iowa, 694; Bell *v.* Sun Print. Asso. 3 Abb. N. C. 157; 42 N. Y. Superior Co't, 567; Wallace *v.* Bennett, 1 Abb. N. C. 478. The statement in the declaration that plaintiff, by being thus called a "crank," had been deprived of divers great earnings in his profession, and had lost royalties on the sales of his book, is too indefinite to serve as an averment of special damage. (Walker *v.* Tribune Co. 29 Fed. Rep. 827.) An allegation that "such false and libelous publication greatly injured and damaged plaintiff," is not an allegation of special damage. (Woodruff *v.* Bradstreet Co. 35 Hun, 16.) Nor is an allegation that plaintiff had fallen into disgrace, contempt and infamy and lost his credit. (Woodbury *v.* Thompson, 3 New Hamp. 95.) Mental suffering need not be alleged in complaint to entitle plaintiff to give evidence of it. (Chesley *v.* Thompson, 137 Mass. 136.) Where the complaint alleges damage to plaintiff's business, it cannot be objected that it does not appear whether the suit is for actual or exemplary damages, or how much is claimed for each. (Bradstreet Co. *v.* Gill, 9 So. East. Rep. 753 [Texas].) Plaintiff alleged he was candidate for membership of a club, that defendant published of him certain words, setting them out, they were not defamatory *per se*, and then alleged that plaintiff thereby lost the advantage of being a candidate with a chance of election, held not a statement of special damage. (Chamberlain *v.* Boyd, 48 Law Times, N. S. 328.)

[3] Molony *v.* Dows, 15 How. Pr. R. 265; Robinson *v.* Marchant, 7 Q. B. 918.

not be given under it of the refusal of a particular company to insure the plaintiff's vessel.[1] Where the allegation was that certain persons, naming them, who would otherwise have employed plaintiff, refused so to do; *Held*, that the allegation was not supported by evidence that certain other persons would have recommended plaintiff to the persons named in the declaration, and that if the plaintiff had been so recommended, the persons named in the declaration would have employed him; the not employing being not on account of the slander, but of the non-recommendation.[2] In an action of slander imputing incontinence to the plaintiff, it was held enough to state that the plaintiff was occasionally employed to preach to a dissenting congregation at a certain licensed chapel, from which he derived considerable profit, and that, by reason of the scandal, "persons frequenting the chapel had refused to permit him to preach there, and had discontinued the emoluments which they would otherwise have given him," without saying who those persons were, or by what authority they had excluded him, or that he was a preacher duly qualified according to statute (10 Anne, c. 2);[3] and in an action for slander for words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, it is competent to the plaintiff to prove, and the jury to assess damages for a general loss or decrease of trade, although the declaration alleges the loss of particular customers as special damage, which is not proved.[4] As a

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[1] Shipman *v.* Burrows, 1 Hall, 399.

[2] Sterry *v.* Foreman, 2 C. & P. 592.

[3] Hartley *v.* Herring, 8 T. R. 130.

[4] Evans *v.* Harries, 1 Hurl. & Nor. 251; and per Martin, B.: "How is a public-house keeper, whose only customers are passers-by, to show a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom?" (*Id.*; and see Rose *v.* Groves, 5 M. & G. 613; Riding *v.* Smith, Law Rep. 1 Ex. Div. 91.) The plaintiff may aver a general diminution of business, or particular instances of damage; in the latter case, the names of the customers lost should be given. (Hamilton *v.* Walters, 4 Up. Can. Rep. 24, O. S.; Wilson *v.* Dubois, 35 Minn. 471.)

general rule the customers should be named,[1] but this is not always necessary.[2] The omission of the names of the customers lost, amounts only to a want of definiteness, and in New York is to be taken advantage of by a motion to make definite and certain, not by demurrer.[3] Where the supposed special damage consists in loss of marriage, the name of the individual with whom the marriage was contemplated should be stated.[4]

§ 346. Where loss of certain customers, naming them, is alleged, the best evidence in support of such allegation is the testimony of the persons named;[5] and so where it is alleged that certain persons, naming them, refused to employ the plaintiff, the best evidence of such refusal is the testimony of the persons named.[6] In an action for words not actionable *per se*, the declaration alleged for

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[1] Mayne on Damages, 278, 317; Feise *v.* Linder, 3 B. & P. 372; Browning *v.* Newman, 1 Str. 666; Westwood *v.* Cowne, 1 Stark. 172; and see 8 T. R. 130; 1 Wms. Saund. 243. It is not mere indefiniteness. In New York, it was held that a general averment of loss of customers is not a sufficient allegation of special damages, and that no proof of loss of customers can be given under such an allegation. (Tobias *v.* Harland, 4 Wend. 537; and see Hallock *v.* Miller, 2 Barb. 630.) The loss of a customer is special damage, although if the dealing had taken place the plaintiff would have lost by it. (Storey *v.* Challands, 8 C. & P. 234; see *ante*, note 6, p. 266.)

[2] Trenton Ins. Co. *v.* Perrine, 3 Zabr. 402; Riding *v.* Smith, Law Rep. 1 Ex. Div. 91.

[3] Hewit *v.* Mason, 24 How. Pr. R. 366; and by 15 & 16 Vict. ch. 76, abolishing special demurrers, the right to demur for want of certainty is abolished and a motion to make definite substituted. It has been said that greater certainty is required where the special damage is the gist of the action, than when it is merely laid by way of aggravation. (Wetherell *v.* Clerkson, 12 Mod. 597; Clarke *v.* Periam, 2 Atk. 33.) An allegation of special damage must be specific. (Cook *v.* Cook, 100 Mass. 194.) Where complaint does not aver special damage, witness cannot give his opinion of amount. (Fleming *v.* Albeck, 67 Cal. 226 and 227.) Witness may testify that publication necessarily injured plaintiff's business. (Blumhardt *v.* Rohr, 17 Atl. Rep. 266.) Where it appears publication was made without intent to injure, and that all proper precautions were observed in the publishing, actual damages only are recoverable. (Even. News Asso. *v.* Tryon, 42 Mich. 549.)

[4] 1 Sid. 396; 1 Vent. 4; Cro. Jac. 499; 12 Mod. 597; and loss of marriage with any other than the one mentioned cannot be proved. (2 Ld. Raym. 1007.) As to alleging special damage in action for slander of title, see *ante*, note 2, p. 284, and Moore *v.* Meagher, 1 Taunt. 39.

[5] Tilk *v.* Parsons, 2 Car & P. 201; Barnett *v.* Allen, 1 Fost. & F. 126; King *v.* Watts, 8 C. & P. 614.

[6] Johnson *v.* Robertson, 8 Porter, 486.

special damage, that, in consequence of the speaking of the words, four of plaintiff's customers ceased to deal with him. Three of those persons proved only that they ceased to deal with plaintiff in consequence of reports they had heard in the neighborhood; but the fourth proved the speaking by the defendant of words substantially as charged, and stated that he did not deal with plaintiff afterwards. *Held*, some evidence of special damage.[1]

§ 347. A plaintiff may unite in one complaint, a cause of action for slander with a cause of action for libel, or for malicious prosecution,[2] or false imprisonment,[3] or slander of title.[4] Assault and battery, or injury to real property, cannot be united with slander or libel.[5] A cause of action in a plaintiff singly for slander of him in his partnership business, cannot be joined with a cause of action in him and his partners jointly.[6] Several sets of words, imputing the same charge, and laid as of the same time, may be included in one count.[7] You may put into one count all the words published at one time, but not words published at different times.[8] A complaint which sets out an entire

[1] Bateman *v.* Lyall, 7 C. B. (N. S.) 638. In King *v.* Townsend, 2 Law Rep. 126 (Appendix, *post*), the special damage laid was that A. B. had, by reason of the libel, *wholly* ceased to deal with the plaintiff, the proof was that A. B. had not, by reason of the libel, dealt with the plaintiff to so great an extent as theretofore, held that this was sufficient evidence of special damage to sustain the declaration.

[2] Martin *v.* Mattison, 8 Abb. Pr. R. 3; Shore *v.* Smith, 15 Ohio, N. S. 173; King *v.* Waring, 5 Esp. 13; Manning *v.* Fitzherbert, Cro. Car. 271; Hull *v.* Vreeland, 42 Barb. 543; Watts *v.* Hilton, 3 Hun, 606; Noonan *v.* Orton, 32 Wis. 106; Delegal *v.* Highley, 3 Bing. N. C. 950; Brooks *v.* Harrison, 91 N. Y. 83.

[3] Harris *v.* Avery. 5 Kansas, 146.

[4] Cousins *v.* Merrill, 16 Up. Can. C. P. Rep. 114. By statute in Ireland, in an action for slander or libel, counts may be added for false representation of plaintiff's goods. (McNally *v.* Oldham, 8 Law Times, N. S. 604.)

[5] Anderson *v.* Hill. 53 Barb. 238; overruling Brewer *v.* Temple, 15 How. Pr. R. 286; Levy *v.* Ginsburg, N. Y. City Court, Nov., 1885. Slander and false imprisonment cannot be joined. (Mahoney *v.* Fitzsimmons, N. Y. City Court, May, 1886; and see Dodge *v.* Colby, 108 N. Y. 445; and 4 Month. Law Bul. 25.)

[6] Robinson *v.* Marchant, 7 Q. B. 918.

[7] Rathbun *v.* Emigh, 6 Wend. 407; Milligan *v.* Thorn, 6 Wend. 412; Dioyt *v.* Tanner, 20 Wend. 190; Churchill *v.* Kimble, 3 Ham. (Ohio), 409; Hoyt *v.* Smith, 32 Vt. (3 Shaw), 304.

[8] Hughes *v.* Rees, 4 M. & W. 204.

conversation in which the slander was spoken, contains only one cause of action although the conversation consists of several parts, each of which is actionable.[1] The second count of a declaration in slander charged that in another discourse of and concerning plaintiff, &c., the defendant spoke these words: "You, Mrs. G. (the plaintiff), have used them for years" (innuendo that plaintiff had used fraudulent weights, and cheated in her trade); and also in the last-mentioned discourse, in answer to a question put by the plaintiff, as to whether the defendant had said to one J. G. that the plaintiff's son had used two balls to the plaintiff's steelyard, these other words: "To be sure I did," &c.; and also these other words, &c.; *Held*, that as there was but one continued discourse at the same time, this was but one count, although the words set out were divided into several sentences.[2] In New York, where the complaint contains several causes of action, each cause of action must be separately stated and numbered,[3] and be perfect in itself.[4]

§ 348. In New York, a supplemental complaint is permitted. A plaintiff in an action for libel may be allowed to serve a supplemental complaint setting out matter material to the action, occurring after the commencement of the action. And in that case a supplemental complaint

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It is allowable to include in the same declaration divers distinct words of slander of different import. (Hall *v.* Nees, 27 Ill. 411; Holmes *v.* Jones, 51 Hun, 345.) It is sometimes a question whether a declaration consists of one or more counts. (See Cheetham *v.* Tillotson, 5 Johns. 430; Griffith *v.* Lewis, 8 Q. B. 841; Fleischmann *v.* Bennett, 78 N. Y. 231.)

[1] Cracraft *v.* Cochran, 16 Iowa, 301. The parts libelous *per se* should be distinguished from those not actionable. (Fleming *v.* Albeck, 67 Cal. 227.)

[2] Griffiths *v.* Lewis, 8 Q. B. 841; 7 Law Times, N. S. 177.

[3] Code Civ. Pro. § 483; Pike *v.* Van Wormer, 5 How. Pr. R. 171. Complaint where one count only sufficient. (Buscher *v.* Scully, 107 Ind. 246.) Declaration referred to master to strike out superfluous counts. (Cranage *v.* Price, 1 Price Pr. Cas. 45.)

[4] Holt *v.* Muzzy, 30 Vt. (1 Shaw), 365; Sinclair *v.* Fitch, 3 E. D. Smith, 689. In Vermont, the pleader may include in a single count words spoken at different times and to different persons, if they relate to the same subject. (Hoyt *v.* Smith, 42 Vt. 304; Hoar *v.* Ward, 47 Vt. 661.)

was allowed, setting up alleged special damage occasioned by the publication of the libel, and occurring after the service of the original complaint.[1]

The allowance of a supplemental pleading is in the *discretion* of the court. It should not be allowed *ex parte*.[2]

[1] Scott *v.* Hallock. MS. Gen. Term Sup. Ct. N. Y. 19 Dec., 1857; and plaintiff was allowed to serve a supplemental complaint showing publications prior to the commencement of the action, but of which plaintiff was ignorant when the original complaint was made. (Corbin *v.* Knapp, 5 Hun, 197.)

[2] Fleischmann *v.* Bennett, 79 N. Y. 579. Where an order allowing a supplemental complaint was made *ex parte*, which order was reversed at general term, held the order at general term was not appealable to the Court of Appeals. (*Id.*)

Motion for leave to serve a supplemental complaint, introducing causes of action on their face barred by the statute of limitations, was denied. (Miller *v.* Johnson, 10 N. Y. Civ. Pro. Rep. 205.)

Trespass and slander of title cannot be joined. (Dodge *v.* Colby, 2 How. Pr. R. N. S. 475; 37 Hun, 515.)

CHAPTER XIV.

PLEADING.—ANSWER.—DEMURRER.

The answer corresponds to plea—What it must contain—Plea to part of a count—Answer of justification must give color, show a lawful occasion, and deny malice—Several answers—Defense of truth must be pleaded—How pleaded—Where the charge is general—Where the charge is specific—Certainty in statement of facts—Answer of justification bad in part, bad altogether—Mitigating circumstances—Demurrer—Counter-claim.

§ 349. The *answer* corresponds to the *plea* in the common-law system of pleading. In New York, it is provided as to an answer, that it "must contain (1) a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counter-claim, in ordinary and concise language, without repetition." And with regard to an answer in the action for slander or libel, it is also provided the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.[1] Material allegations in the complaint not

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[1] Code of Civ. Pro. §§ 500. 535, 536; Bennett *v.* Matthews, 64 Barb. 410. An answer which merely states that the defendant did not utter the words alleged at the place and time alleged, may be good as a general denial. (Salinger *v.* Lusk, 7 How. Pr. R. 430.) Where, in an action for an alleged libel published in a newspaper, the answer admitted that the defendant was the proprietor of the paper, but denied that the publication complained against was made with his knowledge, consent, assent or permission, and

controverted by the answer are "taken as true,"[1] and this applies to allegations of inducement.[2] Objections to the complaint not taken by answer or demurrer, are deemed waived except only the ojection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action.[3] The defendant is not compelled to verify his answer.[4]

§ 350. The general issue in an action for slander or libel *was* "not guilty;"[5] and this had probably a larger effect than has a "general denial" under the New York

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also denied that any person employed by defendant had any right or authority from it to make the publication, the court below held the answer frivolous, but the Court of Appeals reversed that order, on the ground that the answer amounted to a denial of the publication by defendant. (Samuels *v.* Evening Mail Asso. 52 N. Y. 625; see Reg. *v.* Holbrook, L. R. 4 Q. B. Div. 42.) A denial of malice is frivolous unless connected with allegations of mitigating circumstances. (Daly *v.* Byrne, 1 Abb. N. C. 150.) As to a general denial in Maryland. (Hagan *v.* Hendry, 18 Md. 177.) An answer alleging that defendant did not speak the words as charged, with malice, &c., that he believed them to be true, stating reasons for such belief, and that he did not believe the words were spoken within six months, held answers of justification and statute of limitations. (Moore *v.* Edmiston, 70 N. Car. 510.) It is allowable to plead the same matter in justification and in mitigation, but it should be separately stated. After a statement of fact in justification, the pleader may, as a separate statement, add a notice that he will use the same facts in mitigation. (Fink *v.* Justh, 14 Abb. Pr. Rep. N. S. 108.) A plea that the letter containing the defamatory matter was intended for the plaintiff himself, but by mistake was handed to his employer, was held bad. (Fox *v.* Broderick, 14 Irish Com. Law Rep. 453.) In an action for libel defendant at first pleaded not guilty, but afterwards pleaded, to the further maintenance of the action, that plaintiff had recovered damages against another person for the same grievances. New assignment, that the present action was brought for different grievances. Plea to new assignment, not guilty. Held, that this did not admit the innuendoes, and that, by pleading not guilty to the new assignment, defendant had raised precisely the same issue as if the libel had been set out in the declaration, and defendant had pleaded not guilty to it. (Brunswick, Duke of, *v.* Pepper, 2 Car. & K. 683.)

[1] Code of Civ. Pro. § 522, and so in England, Heming *v.* Power, 10 M. & W. 567; Gwynne *v.* Sharpe, 1 Car. & Mar. 532.

[2] Fradley *v.* Fradley, 8 C. & P. 572; *ante*, §§ 312 *a*. 313.

[3] Code of Civ. Pro. § 499, Beach *v.* Ranney, 2 Hill, 309. Admissions in the answer cannot be retracted on the trial. (Whittemore *v.* Ware, 101 Mass. 353.)

[4] N. Y. Code Civ. Pro. § 523; Scoville *v.* New, 12 How. Pr. Rep. 319; Blaisdell *v.* Raymond, 5 Abb. Pr. Rep. 144; 6 *Id.* 148; Gadsden *v.* Woodward, 3 N. Y. State Rep. 102; Goth *v.* Star Print. Co. 14 N. Y. Civ. Pro. Rep. 3; s. c. Goft *v.* Star Print. Co. 21 Abb. N. C. 211; Wilson *v.* Bennett, 2 N. Y. Civ. Pro. R. 34.

[5] No longer admissible. (Tildesley *v.* Harper, L. R. 10 Ch. Div. 393; Harris *v.* Gamble, 47 L. J. Ch. 344.)

Code, by which we intend that under the "general issue" matters of defense were admitted which would not be admitted under the "general denial." Under the New York system of pleading, every defense not consisting of a mere denial must be especially pleaded. A defense of privilege must be especially pleaded.[1] So must the statute of limitations.[2] Much relating to the subject of the plea or answer has been anticipated (§§ 211–216, 313), and much more on the subject will be found under the head of Evidence (§§ 403–406).[3]

§ 350 *a*. As the inducement must be stated in a traversable form (§ 312), so a denial of a material matter of inducement constitutes a good defense, as where the declaration alleged, by way of inducement, that it was disgraceful for a duly qualified physician of the allopathic school to meet one of the homœopathic school in consultation, and then alleged that defendant had published of plaintiff that he had met in consultation with a homœopathist, the plea denied that it was disgraceful for a duly qualified physician of the allopathic school to meet one of the homœopathic school in consultation, and it was held a good plea;[4] and so where the declaration alleged that the term black sheep was used in a defamatory sense, and that the defendant had applied that term to the plaintiff, a plea denying that black sheep was used in a defamatory sense was held good.[5]

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[1] Bell *v.* Parke, 11 Ir. C. L. Rep. 413. Defendant cannot deny generally that "defendant wrote or published the same falsely or maliciously as alleged." He must set out facts to justify. (Belt *v.* Lawes, 51 Law J. R. Q. B. 359; Langton *v.* Hagerty, 35 Wis. 150.) Where the answer after admitting the publication denied that the publication "was maliciously done as in said complaint alleged," and then denied each and every allegation in said complaint contained not hereinbefore admitted or specifically denied, and then set up matter in mitigation, held that the whole complaint was admitted and the only question was that of damages. (Rosenwald *v.* Hammerstein, 12 Daly, 377.)

[2] Code of Civ. Pro. § 380; Pegram *v.* Stoltz, 67 N. Car. 144.

[3] The general issue admitted the character in which plaintiff sued. (Yeates *v.* Reed, 4 Blackf. [Ind.] 463.)

[4] Clay *v.* Roberts, 8 Law Times, N. S. 397.

[5] McGregor *v.* Gregory, 11 M. & W. 287.

§ 351. It was held in New York that a plea in bar must answer the whole count, but that one plea might state several defenses, *i. e.*, different defenses to different parts of one count or statement of a cause of action.[1] Perhaps the rule is, that, if the matter is divisible (§ 145), although contained in one count, a defendant may plead to part of the matter of one count.[2] If the part of the charge not expressly covered by the plea does not amount to an actionable charge, then the plea is in effect to the whole count.[3] A plea to a part of a count, and that part not amounting to an actionable charge, is bad; as where the charge was, "Mr. P. (plaintiff) told me he had given my child too much mercury, *and poisoned it*," and the justification was only of so much as charged giving too much mercury.[4]

§ 352. An answer of justification must give color, at least to the extent of admitting, for the purposes of the defense, the publication complained of.[5] Or, which is in

[1] Cooper *v.* Greeley, 1 Denio, 365; and see Ames *v.* Hazard, 6 R. I. 335; 8 *Id.* 143. That a plea may apply to part of a libel. (See Spencer *v.* Southwick, 11 Johns. 573.)

[2] See Edwards *v.* Bell, 1 Bing. 403; Cooper *v.* Lawson, 1 Perr. & D. 15; O'Connell *v.* Mansfield, 9 Ir. Law Rep. 179; Smith *v.* Ottendorfer, 3 N. Y. St. Rep. 187; and see *ante*, note 2, p. 156, and Torrey *v.* Fields, 10 Vt. 353. Where the first count in a declaration for a libel alleged that plaintiff, a proctor, had been three times suspended, and the second count alleged the having been suspended three times for extortion; the plea as to so much of the charge as imputed one suspension, justified it as being true, held on demurrer that the plea was good, and that it was sufficiently applicable to the charge in the first count, if not to that in the second. (Clarkson *v.* Lawson, 6 Bing. 587.)

[3] Barrows *v.* Carpenter, 1 Cliff. 204; Clarke *v.* Taylor, 3 Scott, 95. If the part not justified contains ambiguous statements, the court will not draw any libelous inference from them, if plaintiff has not done so in his declaration. (*Id.*)

[4] Edsall *v.* Russell, 4 M. & Gr. 1090; 5 Sc. N. R. 801.

[5] Goodman *v.* Robb, 24 Week. Dig. 509; 41 Hun, 605; Fidler *v.* Delavan, 20 Wend. 57; Wilson *v.* Beighler, 4 Iowa, 427; Van Derveer *v.* Sutphin, 5 Ohio, N. S. 293; Edsall *v.* Russell, 2 Dowl. N. S. 641; 5 Sc. N. S. 801: Davis *v.* Matthews, 2 Ham. 257; Folsom *v.* Brown, 5 Foster (N. Hamp.), 114; Samuel *v.* Bond, Litt. Sel. Cas. 158; Buddington *v.* Davis, 6 How. Pr. R. 402; Porter *v.* McCreedy, 1 Code Rep. N. S. 88. A plea of justification held bad unless accompanied with a traverse of the publication in a manner to defame. (Crawford *v.* Milton, 12 S. & M. 328; see Carlock *v.* Spencer, 2 Eng. 12.) A defense of privilege admits the falsity of the charge. (Per Coleridge, Ch. J.; Cocking *v.* Curtis, London Times, 24 April, 1880.)

effect the same thing, the defense should not be hypothetical. Thus a defense, in substance, that "if defendant spoke any slanderous words concerning plaintiff, of the nature of those charged in the complaint, they were confidential and privileged, and were not spoken in malice," was said to be insufficient.[1] An admission in one defense cannot be used to defeat a denial in a separate defense in the same answer, because "one plea cannot be taken to help or destroy another, but every plea must stand or fall by itself."[2] A plea of privileged publication must show a lawful occasion, and a denial of malice; a plea which only alleged that the defendant spoke the words on such occasion, firmly believing them to be true, was held bad for want of an express or implied denial of malice.[3]

[1] Goodman *v.* Robb, 41 Hun, 605; 5 N. Y. St. Rep. 242. But how the insufficiency is to be taken advantage of was not decided. We venture to say that such a defense would not entitle the defendant upon the trial to offer any evidence in support of it. As the whole defense was hypothetical it could not be struck out on motion; but where part of a defense is hypothetical that part may be struck out on motion. (Wies *v.* Fanning, 9 How. Pra. Rep. 543.)

[2] Grills *v.* Mannell, Willes, 380; Kirk *v.* Nowill, 1 T. R. 125; Montgomery *v.* Richardson, 5 C. & P. 247; and see cases collected, Voorhies' Code, 296 *c*, 8th edit.; *contra*, see Jackson *v.* Stetson, 15 Mass. 48; Alderman *v.* French, 1 Pick. 1; Cilley *v.* Jenness, 2 N. Hamp. 89; Whitaker *v.* Freeman, 1 Dev. 280; Wheeler *v.* Robb, 1 Blackf. 330; Wright *v.* Lindsay, 20 Ala. 428; Doss *v.* Jones, 5 Howard (Miss.), 158; Rev. Stat. of Mass. ch. 100, § 18; Hix *v.* Drury, 5 Pick. 260.

[3] Smith *v.* Thomas, 2 Bing. N. C. 372; 2 Sc. 546; 4 Dowl. Pr. Cas. 333; 30 Alb. L. J. 516. Except in defenses of privileged publication, the denial of malice forms an immaterial issue. (Fry *v.* Bennett, 5 Sandf. 54.) When privilege is established malice must be shown. (Caulfield *v.* Whitworth, 16 Weekly Rep. 936.) A plea of privileged communication must show it was defendant's duty or interest to make the publication. (Praeger *v.* Shaw, 4 Ir. Com. Law Rep. 660; and see Echlin *v.* Singleton, 14 Ir. Jur. [7 N. S.] 225; Simmonds *v.* Duane, Ir. Rep. 7 Com. Law, 319.) A defense of fair comment must allege the publication to have been a fair comment upon the plaintiff's conduct on the occasion therein referred to. (Clinton *v.* Henderson, 13 Ir. Com. Law Rep. Appendix, xliii [e]. The plea in Earl of Lucan *v.* Smith, 26 Law Jour. Ex. 94, note 2, disapproved of.)

Action of libel for publishing a sentence of suspension pronounced by defendant against plaintiff. Pleas, (1) that plaintiff was suspended for breach of the laws of the Church of Rome; (2) privilege; replication to first plea, that a law of the Church prohibited one ecclesiastic from impleading another in a temporal court, and that the sole ground of plaintiff's suspension was that he, being an ecclesiastic, had impleaded another ecclesiastic in a temporal court. Rejoinder, that such impleading was for slanderous words spoken by him in his character of priest concerning plaintiff, and that such impleading violated a law of the

§ 353. The defendant may, in one answer, set up a general denial, or not guilty, and a justification on the ground of truth.[1] But he cannot, with not guilty as to the whole declaration, plead as to part of the declaration a special plea of apology and payment into court under the statute 6 & 7 Vict. ch. 96.[2] Although a defendant may be allowed with not guilty to plead the mere fact that the words were a fair comment without malice, he cannot with not guilty interpose a plea alleging the existence of certain facts, and that the alleged libel was a fair comment on transactions of public notoriety. The fact of fair comment is involved in not guilty.[3]

§ 354. A defendant, to avail himself of the defense of truth, must set it up as a defense by plea or answer.[4] The defense of truth may be interposed, although the power to

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Church. On demurrer, held both pleas were bad. (O'Keefe *v.* Cullen, Ir. Rep. 7 Com. Law, 319.)

[1] Buhler v. Wentworth, 17 Barb. 649; Hollenbeck *v.* Clow, 9 How. Pr. Rep. 289; Ormsby *v.* Douglas, 5 Duer, 665; Payson *v.* Macomber, 3 Allen (Mass.), 69; Miller *v.* Graham, 1 Brevard, 283; Smith *v.* Smith, 39 Penn. St. Rep. 441; Harper *v.* Harper, 10 Bush (Ky.), 447; Horton *v.* Banner, 6 *Id.* 596; Cole *v.* Woodson, 32 Kan. 272; and see Kelly *v.* Craig, 9 Humph. 215; *contra*, Attebury *v.* Powell, 29 Mo. (8 Jones), 429. To a declaration containing three counts for three distinct libels, the court refused to allow the defendant to plead one general plea of justification. (Honess *v.* Stubbs, 7 C. B. N. S. 555.) Inconsistent defenses allowed. (Horton *v.* Banner, 6 Ky. [Bush], 596; Weston *v.* Lumley, 33 Ind. 486.)

[2] O'Brien *v.* Clement, 15 M. & W. 435; 3 D. & L. 676; 15 Law Jour. Rep. 285, Ex. Apology is by statute, in Virginia, a mitigation. Now, in England, the defendant may in any case bring money into court. (Hawkesley *v.* Bradshaw, L. R. 5 Q. B. Div. 302.)

[3] Lucan *v.* Smith, 1 Hurl. & N. 481; 20 Jur. 1107. The fact that the same matter which is specially pleaded might be given in evidence under the general issue is not always a sufficient ground for rejecting the special plea. (Parker *v.* McQueen, 8 B. Monroe, 16.) Plea of apology and traverse of alleged defamatory sense is not allowed. (Barry *v.* McGrath, Ir. Rep. 3 Com. Law, 576.) In an action for a libel contained in two letters published in a newspaper, the defendant pleaded that the second letter (itself actionable) was a fair comment upon the facts in the first letter; held bad. (Walker *v.* Brogden, 17 C. B. N. S. 571.) Form of plea of fair comment. (Clinton *v.* Henderson, 13 Ir. Com. Law Rep. Appendix, 43; O'Keefe *v.* Cullen, Ir. Rep. 7 Com. Law, 551; see § 409, *post.*)

[4] *Ante*, §§ 211 to 216, note 1, p. 307, § 409, *post;* Curtis *v.* Perkins, 66 Barb. 610; Manning *v.* Clement, 7 Bing. 367; 2 Greenl. Ev. 424; Hagan *v.* Hendey, 18 Md. 177; Frederitze *v.* Odenwalder, 2 Yeates, 243; Barrows *v.* Carpenter, 1 Cliff. 204; Donaghue *v.* Gaffy, 54 Conn. 257. The plea of truth is an issuable plea. (Woodward *v.* Andrews, 1 Brev. 310.)

punish for the offense has been tolled by lapse of time,[1] or although the plaintiff has been tried upon the charge and acquitted[2] or pardoned.[3] The plea is in confession and avoidance.[4]

§ 355. That the justification on the ground of truth must be as broad as the charge, and must justify the precise charge, has already been considered[5] (§ 212). We have now but to point out some other requisites of a plea or answer on the ground of truth.[6] These depend upon

[1] Van Ankin *v.* Westfall, 14 Johns. 234. Where words were actionable *per se*, a plea of not guilty within two years held good. (Quinn *v.* Wilson, 13 Irish Law Rep. 381.)

[2] Cook *v.* Field, 3 Esp. 133; England *v.* Bourke, *Id.* 80. A judgment for defendant in a suit for moneys received to use of plaintiff does not estop the plaintiff in that suit, when sued for accusing the defendant in that action of having stolen such moneys, from justifying the charge as true. (Henderson *v.* Fox, 6 So. East. Rep. 164 [Ga.].)

[3] *Ante*, note 1, p. 307, and § 158, and § 400, as to pleading a justification.

[4] Gault *v.* Babbitt, 1 Bradw. (Ill.) 130.

[5] Where the charge was, "I caution you against M. W. (plaintiff); she came here an excommunicated prostitute, *the outcast of a barrack*," held that a plea that plaintiff was a prostitute was not a justification. (Wright *v.* Sullivan, Hayes Ir. Ex. Rep. 104; see first note to § 371, *post.*) Where the words are laid with an innuendo, defendant may justify the words, either with or without justifying the innuendo. (Watkin *v.* Hall, L. R. 3 Q. B. 396.) In Ireland the justification must be of both the words and the innuendo. (Hart *v.* Reade, Ir. R. 7 C. L. 551.) If the innuendo is warranted defendant must justify the innuendo. (Royce *v.* Maloney, 58 Vt. 437; Nott *v.* Stoddard, 38 Vt. 35; Ames *v.* Hazard, 8 R. I. 43.) Where the charge is divisible, defendant may justify part. (McGregor *v.* Gregory, 11 M. & W. 287; Churchill *v.* Hunt, 2 B. & Ald. 685; Roberts *v.* Brown, 10 Bing. 519; Biddulph *v.* Chamberlayn, 17 Q. B. 351; Clarke *v.* Taylor, 2 Bing. N. C. 668) Where the charge is specific, the justification must justify the specific offense charged. (Daly *v.* Byrne, 1 Abb. N. C. 150; Robinson *v.* Hatch, 55 How. Pra. Rep. 55; Ball *v.* Even. Post Pub. Co. 38 Hun. 11; Knox *v.* Commercial Agency, 40 Hun, 508.)

[6] Whether a defense contains a justification must be determined by the language used in it, and the defense cannot be aided or enlarged by an introductory clause characterizing it or expressing its purpose. (Kelly *v.* Waterbury, 87 N. Y. 179.) Defendant alleging in his answer to a complaint for slander, that all his sayings and conduct will be proved as a justification, is not thereby prevented from showing that the communications were privileged, the truth of the words charged not being admitted or denied. (Halstead *v.* Nelson, 24 Hun, 395.) A justification is not a waiver of the defense of privilege. (Wilson *v.* Sullivan, 7 So. East. Rep. 274 [Ga.].) A repetition of an assertion against plaintiff can be justified only by showing the assertion to be true. (Ryer *v.* Fireman's Jour. Co. 11 Daly, 251.) Where the "statement of claim" alleged that defendant "falsely and maliciously" published of plaintiff, a denial that defendant published "falsely or maliciously as alleged,"

whether the charge is general or specific. (§ 356.) Where the charge is in general terms, the answer must state the facts which show the charge to be true. It is not sufficient merely to allege that the charge is true.[1] Where the charge is that the plaintiff is a swindler,[2] or a thief, or a perjurer, or a murderer,[3] or that he stole a watch,[4] or certified a lie,[5] or was of intemperate habits,[6] or received a bribe,[7] or perverted the law,[8] or is a politician,

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was stricken out. If defendant desired to controvert that publication was false, he must plead truth; if to controvert that the publication was malicious, he must plead the circumstances which repel the implication of malice. (Belt *v.* Lawes, 51 Law Jour. Rep. C. L. N. S. 359.)

[1] Fry *v.* Bennett, 5 Sandf. 69; Lawton *v.* Hunt, 4 Rich. 458; Attebury *v.* Powell, 29 Mo. (8 Jones), 429; Billings *v.* Waller, 28 How. Pr. Rep. 97; Barrows *v.* Carpenter, 1 Cliff. 204; Cook *v.* Tribune Asso. 5 Blatchf. C. C. 352; Sweeney *v.* Baker, 13 W. Va. 158; Bruton *v.* Downes, 1 Fost. & F. 668; Holmes *v.* Catesby, 1 Taunt. 543. Where a particular meaning is alleged, it is not sufficient to say the charge is true, with the addition of time, place, and circumstance. (Fidler *v.* Delavan, 20 Wend. 57.) A man cannot defame in one sense and justify in another. (*Id.*; Kerr *v.* Force, 3 Cranch C. C. 8.) But since the common-law procedure act in England, a general plea of justification is allowed there, but in such case the plaintiff is entitled to particulars of the charges intended to be justified. (Behrens *v.* Allen, 8 Jur. N. S. 118; Jones *v.* Bewicke, Law Rep. 5 C. P. 32; Stainbank *v.* Backett, Week. Notes, 203, 1879; note 1, p. 596.)

[2] J'Anson *v.* Stuart, 1 T. R. 748. It is not a justification of a charge of plaintiff being a swindler to allege that defendant delivered to plaintiff goods to sell on commission, that he failed to return them or to account for them, and that he made an assignment for the benefit of his creditors. (Herr *v.* Bamberg, 10 How. Pr. Rep. 128.) It is not a justification of a charge that plaintiff had appropriated a play called "Flirtation" to allege that plaintiff appropriated a play called "Mock Marriage." (Daly *v.* Byrne, 1 Abb. N. C. 150.) Charging plaintiffs, publishers, with swindling, held is justified by proof that a serial publication was not completed in the stipulated numbers. (Johnson *v.* Grove, 11 Weekly Dig. 562.)

[3] Anon. 3 How. Pr. Rep. 406; Sayles *v.* Wooden, 6 *Id.* 84; Johnson *v.* Stebbins, 5 Ind. 364. Where the words complained of were, "She is a thief, and has stolen my gold pen and pencil," held that the answer might properly allege a variety of thefts by the plaintiff of different articles, as going to justify the words "She is a thief." (Jaycocks *v.* Ayres, 7 How. Pr. Rep. 215.) A charge of forgery against a whole community was held to be justified by alleging a falsification of poll books. (Fellowes *v.* Hunter, 20 Up. Can. Q. B. Rep. 382.)

[4] Anibal *v.* Hunter, 6 How. Pr. Rep. 255.

[5] Jones *v.* Cecil, 5 Eng. (10 Ark.) 592.

[6] Buddington *v.* Davis, 6 How. Pr. Rep. 401.

[7] Van Ness *v.* Hamilton, 19 Johns. 349.

[8] Riggs *v.* Denniston, 3 Johns. Cas. 198. In an action of slander, when the charge is made directly, the plea of justification should aver the truth of the charge, as laid in the declaration; but when the charge is made by insinuation and circumlocution, so as to render it necessary to use introductory matter to show the meaning of the words, the plea should aver the truth of the charge which the declara-

and had squandered his father's money, and married a Brooklyn concert singer.[1] The distinction seems to be that where the charge is a conclusion or inference from certain facts, there the plea must set up the facts which warrant such an inference; but where the charge is of some specific act or acts, there it is sufficient if the plea allege that the charge is true (§ 356). Thus, if it be said of a man, that he is a swindler, this is an inference from his actions, and which can be proved only by showing acts of fraud on the part of the plaintiff amounting to swindling; and, therefore, as we have seen, to justify a charge of being a swindler, the plea must allege the facts upon which the defendant relies to make out the charge. Where the defendant attempted to justify a charge of fraud by setting up in his plea that he and plaintiff had had dealings together, and defendant believing that plaintiff had cheated him, and in consequence of such belief, and believing said charge to be true, he published the same, the plea was set aside as embarrassing and uncertain.[2] When the charge is general, and the answer merely an averment that the charge is true, the plaintiff *may*, it seems, under the New York practice, apply to have the answer made "definite and certain;" but he is not obliged to do this, he *may* lie by, and on the trial object to the reception of any evidence in support of such a plea, either in bar or in mitigation.[3]

tion alleges was meant to be made. (Snow *v.* Whitcher, 9 Ired. 346; and see Berens *v.* Allen, 3 Fost. & F. 135.)

[1] Knox *v.* Com'l Agency, 1 N. Y. St. Rep. 84.

[2] Hennessy *v.* Morgan, 8 Ir. C. L. R. lxix, Appendix. A justification alleging that plaintiff had had sexual intercourse with her brother is sufficient to cover a charge that she had had such intercourse and was pregnant thereby. (Edwards *v.* Knapp, 10 So. West. Rep. 54 [Mo.].)

[3] Wachter *v.* Quenzer, 29 N. Y. 553; Robinson *v.* Hatch, 55 How. Pr. R. 55; Tilson *v.* Clark, 45 Barb. 181; and see Brickett *v.* Davis, 21 Pick. 404. Generally upon the trial the plaintiff cannot object to the insufficiency of a plea of justification (Evans *v.* Franklin, 26 Mo. [5 Jones], 252), as he might have demurred; but if the justification be proved, the defendant is entitled to a verdict on that plea. (Edmonds *v.* Walter, 3 Stark. R. 7; and see Churchill *v.* Hunt, 2 B. & Ald. 685; 1 Ch. 480; *contra*, as to a notice of justification, Thompson *v.* Bowers, 1 Doug. [Mich.] 321.) Held to be error for the court to charge of its own motion that the plea is so defective as not to be available to de-

In England, the practice is to allow, in all cases subject to a bill of particulars, a general plea of justification.[1]

§ 356. As to specific charges.[2] Where the charge is specific, there the answer need only to allege that the charge is true. Thus in an action for calling the plaintiff thief, and saying he stole two sheep of J. S., the defendant pleaded that the plaintiff stole the same sheep, by reason of which he (defendant) called plaintiff thief, as well he might, and the plea was held good.[3] And so where the charges were of theft of certain articles specified, and of practicing prostitution, specifying instances;[4] and where the charge was that the plaintiff, as inspector of drugs, had improperly passed an adulterated article, an answer merely alleging the charge to be true was held to be sufficient.[5] A plea that the defamatory matter "is true in substance and effect," means that it is true in every material particu-

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fendant. (Bryan *v.* Gurr, 27 Ga. 378.) A. sued B. for charging him with perjury. B. justified as follows: "Defendant avers that plaintiff, in swearing to a complaint against Samuel Steele, executor, &c., swore falsely by stating in said complaint that said estate owed nothing, when plaintiff then knew the estate was indebted," &c. Held insufficient, as it gave plaintiff no information of the indebtedness to be proved. The fact that plaintiff took issue on this plea did not entitle defendant to give any evidence in support of it. (Steele *v.* Phillips, 10 Humph. 461.)

[1] Gourley *v.* Plimsoll, Law Rep. 8 C. P. 362; *ante*, note 1, p. 593. In New York a bill of particulars was refused. (Orvis *v.* Dana, 1 Abb. N. C. 268.)

[2] Knox *v.* Com'l Agency, 1 N. Y. St. Rep. 85, Brady, J., referring to Wachter *v.* Quenzer (29 N. Y. 547), says: The court approved the rule stated by *Mr. Chitty in his treatise on slander*, which declares that if the defendant undertakes justification it must be by stating the particular facts which evince the truth of the imputation, and that the rule holds whether the imputation be of a general or a specific nature. We are aware that Mr. Chitty was a voluminous writer, but we had never until we read the report of *Knox* v. *Com'l Agency* heard of his treatise on slander. Probably his treatise on *pleading* was intended. Where the charge was mental unsoundness, an answer that the charge was true is sufficient. (Moore *v.* Francis, 3 N. Y. Supp. 162.)

[3] 1 Rolle Abr. 87; Fitch *v.* Lemmon, 27 Up. Can. Q. B. Rep. 273. Where the original charge is in itself specific, defendant need not further particularize it in his plea. (1 Stark. Sland. 478.) A plea that the charges are true, held bad. (Baretto *v.* Pirie, 26 Up. Can. Q. B. Rep. 468.)

[4] Steinman *v.* Clark, 10 Abb. Pr. R. 132.

[5] Van Wyck *v.* Guthrie, 4 Duer, 268. A general plea averring plaintiff's residence in O. county, his being known to divers citizens there, and having a bad reputation among them, is good. (Cooper *v.* Greeley, 1 Denio, 347.)

lar.[1] To a charge of being a liar, a plea that "sundry honest men, to wit, A. B.," &c., naming them, "and others, believed and considered the plaintiff not to be a man of truth, but addicted to falsehood," would not be sufficient justification.[2]

§ 357. The facts which show the charge to be true

[1] Weaver *v.* Lloyd, 4 D. & R. 230. An answer which alleged that the matter complained of was true, *according to the true intent and meaning thereof*, was, on demurrer, held good; the words in *italic* were surplusage. (Kelly *v.* Taintor, 48 How. Pr. R. 270.) A plea to an action for libel purporting to be the report of a trial "that alleged libel was in substance a true report of the trial," held bad on demurrer. (Flint *v.* Pike, 6 D. & R. 528; 4 B. & C. 473.) To a declaration for an alleged libel published in a newspaper, purporting to be an account of the trial of an action, the plea stated that at the trial the counsel made the speech set out in the alleged libel, and that certain witnesses proved all that had been so stated; held bad on demurrer, for that the plea ought to have detailed such evidence, and shown the truth of the facts so stated, and not merely have stated the conclusion which the party himself drew from the evidence. (Lewis *v.* Walter, 4 B. & Ald. 605.)

[2] Brooks *v.* Bemiss, 8 Johns. 356; see Wilson *v.* Fitch, 41 Cal. 363. Under a plea of justification on the ground of truth, the defendant cannot show that he believed the charge true. (Hix *v.* Drury, 5 Pick. 296.) Justification of a libel, that from what had been said there was a reason for thinking the imputation was true; held bad on demurrer, unless it is stated what had been said, and by whom. (Lane *v.* Howman, 1 Price, 76.) To constitute a justification, the answer should aver the truth of the defamatory matter charged. It is not sufficient to set up the facts which only tend to establish the truth of such matter. (Thrall *v.* Smiley, 9 Cal. 529.) Where it was alleged that defendant spoke of plaintiff, "I am told M. (plaintiff) was the man who killed the peddler, and I believe it," a plea which averred that defendant was told plaintiff was the man who murdered the peddler, and that defendant did believe it, was held bad. (Muma *v.* Harmer, 17 Up. Can. Q. B. Rep. 293.) Where the charge was: "There is no doubt but that he (plaintiff) *abstracted* the cable," innuendo stole it. A plea that it had been rumored that a party of persons, including plaintiff, had *taken* said cable, held no justification. (Ede *v.* Scott, 7 Ir. L. R. N. S. 67.) Action for libel in charging plaintiff with preparing mineral water for analysis by a chemist, so as to get a favorable report thereon. The words claimed to be libelous were as follows: "In stating these facts, we do not intend to implicate the chemist, who did not procure water himself (as he should) at the springs, who did not know how much fresh water was added to diminish the proportionate amount of the offending iron and gross salts to the water, or how much valuable salts were added before closing the bottles sent him." The answer set up: "It is also true that the chemist in said artice referred to, did not procure the water himself from the waters of the spring as he should; that he did not know how much (if any) fresh water was added to diminish the proportionate amount of offending iron and gross salts to the water, or how much, if any, valuable salts were added before closing the bottles sent him." Upon demurrer held that the answer was defective as to that portion, as not pleading justification. (Hathorn *v.* Congress Spring Co. 44 Hun, 608.) Answer not alleging truth of matter published, but that words were published by another is not a justification. (Funk *v.* Beverly, 112 Ind. 190.)

must be stated with certainty,[1] so that the court may see whether the defendant was justified in what he published;[2] and (when a reply was necessary) so that the plaintiff might have an opportunity of denying and taking issue upon the facts alleged; and it was no excuse for general pleading that the subject comprehended a multiplicity of facts tending to prolixity, nor that the plea was not more general than the charge.[3] Where a declaration stated that plaintiff was lawfully possessed of mines and of ore gotten from them, and was in treaty for the sale of the ore, and that the defendant published a malicious, injurious, and unlawful advertisement, cautioning persons against purchasing the ore, &c., *per quod* he was prevented from selling; to which the defendant pleaded in justification, that the shareholders in the mines thought it their duty to caution persons against purchasing the ore, &c. (pursuing the words of the advertisement); this plea was held ill on special demurrer: first, because it did not disclose the names of the adventurers, or who they were; and secondly, because it did not show that the defendant made the publication under the direction of the shareholders.[4] And where the plaintiff, a justice of the peace, brought an action against the defendant for charging him with pocketing all the fines and penalties forfeited by delinquents whom he had convicted, without distributing them to the poor, or in any manner accounting for a sum of £50 then on hand, the defendant pleaded that the plaintiff was a justice of the peace, and that, during the time he acted as such, he convicted sundry persons in sundry sums of money, for divers offenses against divers

[1] Van Ness *v.* Hamilton, 19 Johns. 349; Riggs *v.* Denniston, 3 Johns. Cas. 198. A plea of justification is taken most strongly against the pleader; everything must be precisely alleged; it must be "certain to a certain intent in general." (Kerr *v.* Force, 3 Cr. C. C. 8.)

[2] Torrey *v.* Field, 10 Vt. 353; Johnson *v.* Stebbins, 5 Ind. 364.

[3] Van Ness *v.* Hamilton, 19 Johns. 349.

[4] Rowe *v.* Roach, 1 M. & S. 304.

statutes, which sums, amounting together to £50, he received of the persons so convicted, and had not paid over the same as required by law. On special demurrer, the plea was held bad (not sufficiently certain) for not stating the names of the persons who paid said sums of money, and the amount which each person paid.[1] Where the libel stated that the plaintiff, as manager of the opera, employed his critics in attacking, in corrupt and purchased newspapers, the females of his company, it was held that the justification of such a charge must state the names of the critics, of the females, and of the corrupted newspapers, and the substance of the articles, and the times and places of their publication.[2] But where the libel charged that certain exhibitions of opera by the plaintiff were an unfit resort for respectable people, and that they were attended by persons of certain specified immoral and illegal occupations or pursuits—held that an answer justifying such charge need do no more than reaffirm the statement contained therein, and need not specify the names of the persons who attended such exhibitions; and certainly this will be the case where the defendant alleges that the names of such persons are unknown to him.[3] Where the charge was that the plaintiff made himself invisible on account of too much borrowing and not paying, innuendo that plaintiff ran away, held that an answer which stated "it is true the plaintiff made himself invisible on account of too much borrowing and not paying, that is, ran away," was insufficient.[4] And in an action of slander in charging the plaintiff, a pawnbroker, with the practice of duffing, *i. e.*, of doing up damaged goods and pledging them again, a plea alleging that the plaintiff did do up *divers* damaged goods and

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[1] Newman *v.* Bailey, 2 Chit. R. 665.

[2] Fry *v.* Bennett. 5 Sandf. 54.

[3] Maretzek *v.* Cauldwell, 2 Robertson, 715.

[4] Wachter *v.* Quenzer, 29 N. Y. 552. A charge of moral obliquity must be proved by some act done *mala fide*. (Kerr *v.* Force, 3 Cranch C. C. 8.)

repledge to divers persons, &c., was, on special demurrer, held bad, for not stating specific instances and persons.[1] And where the libel charged an attorney with general misconduct, viz., gross negligence, falsehood, prevarication, and excessive bills of costs in the business he had conducted for the defendant, a plea in justification repeating the same general charges, without specifying the particular acts of misconduct, was, upon demurrer, held insufficient.[2] A declaration alleged that plaintiff was cashier to Q., and that defendant, in a letter addressed to Q., wrote, "I conceive there is nothing too base for him (plaintiff) to be guilty of." Plea, in justification, alleged that plaintiff signed and delivered to defendant an I. O. U., and afterwards, on having sight thereof, falsely and fraudulently asserted that the signature was not his; and the plea averred that the libel was written and published solely in reference to this transaction—held a sufficient justification, as the libel must be understood with reference to the subject-matter.[3] Where the defendant, a railway corporation, published a placard headed "Caution," and containing the plaintiff's name and address, and stated that he had been convicted of traveling on its railway without having first paid his fare, in an action for libel, the declaration contained an innuendo that the defendant meant thereby that

[1] Hickinbotham *v.* Leach, 2 Dowl. Pr. Cas. N. S. 270; 10 M. & W. 361. To an action for slander in charging plaintiff with stealing corn and fodder from various persons, a plea of justification leaving blanks for the dates and amounts would be bad on special exception, but cannot be attacked on a general exception. (George *v.* Lemon, 19 Texas, 150.)

[2] Holmes *v.* Catesby, 1 Taunt. 543. And the justification must show plaintiff was acting in his professional capacity. (Brown *v.* Burnett, 10 Bradw. [Ill.] 279.)

[3] Tighe *v.* Cooper, 7 El. & B. 639; 21 Jur. 716. A plea of justification need not meet the exact words of the libel, but may adopt the sense put by the innuendo, and justify that. (O'Connor *v.* Wallen, 6 Irish Com. Law Rep. 378.) The declaration, after alleging that plaintiff had taken an oath under the election law, alleged that defendant charged plaintiff with having sworn false, meaning that plaintiff was guilty of perjury. Plea that plaintiff did swear false, in swearing he was a resident, plea held bad; it should have been the general issue, or have justified the perjury. (Strachan *v.* Barton, 34 Up. Can. Q. B. Rep. 374.)

the plaintiff had attempted to defraud the company; the plea was to the effect that the plaintiff was charged and convicted as alleged; on demurrer, this plea was held good, as containing a justification of the charge and of the innuendo.[1]

§ 358. It is said that to justify a charge of crime, the plea or answer must specify the crime with certainty,[2] and show the commission of the crime with as much certainty as in an indictment for such crime.[3] In an action of slander for charging the plaintiff with having stolen the defendant's shingles, a justification stating that the plaintiff had sold the defendant's shingles without authority, and afterward denied that he knew anything respecting them, without alleging that the plaintiff took them privately or feloniously, was held not to amount to a charge of larceny, and was bad as a justification.[4] To a charge of procuring an abortion, it was held not a sufficient plea that the plaintiff assisted in procuring an abortion, without allegations showing the assistance criminal.[5] Where the charge was that plaintiff "swore falsely," without reference to any judicial or other proceeding in which an oath could have been lawfully administered, a plea of justification pointing the plaintiff to the time, place, and occasion of his false swear-

[1] Biggs *v.* Gt. East. R. R. 18 Law Times, N. S. 482. The declaration alleged that defendant had published of plaintiff, then late a conductor in the employ of defendant, that an envelope was mailed at Hamilton, containing four coupon tickets. &c., and that plaintiff had been dismissed, innuendo that plaintiff had conducted himself fraudulently in his said employment, and attempted to defraud the company, and had been dismissed therefor. Plea, that an envelope was mailed, &c. *Held*, for the plea was good. It undertook to justify the alleged libel with the innuendoes. (Tench *v.* Swinyard, 29 Up. Can. Q. B. Rep. 319.)

[2] Nall *v.* Hill, Peck (Tenn.), 325. When any circumstance is stated which describes or identifies the offense, it must be averred for the purpose of showing that it is the same offense. (Sharpe *v.* Stephenson, 12 Ired. 348.) An error as to time will not vitiate a defense of justification. (Ropke *v.* Brooklyn Daily Eagle, 9 N. Y. St. Rep. 709.)

[3] Snyder *v.* Andrews, 6 Barb. 43; Steele *v.* Phillips, 10 Humph. 461.

[4] Shepard *v.* Merrill, 13 Johns. 475.

[5] Bissell *v.* Cornell, 24 Wend. 354; and see Calkins *v.* Colburn, 10 N. Y. St. Rep. 778.

ing, and alleging the truth of the words spoken, was held to be good.[1] Where the charge is perjury, the plea must allege not only that the defendant testified to what was untrue, but that he did so knowingly,[2] and that the matter testified to was material.[3] If the charge be of having sworn falsely in a judicial proceeding, without the necessary averments to make the slander amount to an imputation of perjury, then a plea of justification, that the plaintiff did swear falsely in the particular proceeding, would be sufficient.[4] Where the charge is that the plaintiff perjured himself on a particular occasion, the justification must be confined to that.[5] Thus in slander for charging the plaintiff with committing perjury in making a certain statement, set out in the declaration, as a witness in a certain case, the defendant pleaded that the plaintiff did commit perjury by making that statement, and that on the same trial he committed perjury by another statement made by him on the same trial, and not set out in the declaration. On demurrer to both pleas, the first was held good and the second

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[1] Sanford *v.* Gaddis, 13 Ill. 329. To an action of slander for charging the plaintiff with having forged a certain instrument of writing, the truth was pleaded in justification. Held, that such a plea could not be objected to because it avers the forged instrument to be in the plaintiff's possession or destroyed. Held, also, that in a plea with such an averment, the instrument need not be so particularly described as would be otherwise required. (Kent *v.* David, 3 Blackf. 301.)

[2] Chandler *v.* Robison, 7 Ired. 480; Tull *v.* David, 27 Ind. 377; Mull *v.* McKnight, 67 Ind. 535.

[3] McGough *v.* Rhodes, 7 Eng. (12 Ark.) 625; Harris *v.* Woody, 9 Mo. 112. It is no justification to an insinuation of perjury against plaintiff (who had sworn to an assault by A. B. on him), that it did appear (which was the suggestion in the libel) from the testimony of every person in the room, &c., except plaintiff, that no violence had been used by A. B., &c.; for *non constat* thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to such parts of the supposed libel as purport to contain an account of the trial, &c., and that the said parts contain a just and faithful account of the trial, &c. (Stiles *v.* Nokes, 7 East, 493.)

[4] Sanford *v.* Gaddis, 13 Ill. 329. "The answer should set forth the evidence, and what was actually sworn to by plaintiff at the time alleged" (3 Chit. Pl. 1039; Yates's Plead. 430; Woodbeck *v.* Keller, 6 Cow. 122), and the Code of New York has not altered the rule in this respect. (Tilson *v.* Clark, 45 Barb. 180; Wachter *v.* Quenzer, 29 N. Y. 553.)

[5] Palmer *v.* Haight, 2 Barb. 210.

bad.[1] In an action for slander in charging the plaintiff with perjury, a plea was that the words were spoken in reference to the testimony of the plaintiff on the trial of a cause, and after setting out the parties, the nature of the action, and the questions litigated, it stated the evidence given on such trial, and averred that *the words were spoken in reference to certain parts of the testimony* (*specifying them*) *which were not material to the issue, and that the defendant was so understood by the hearers;* it was held that the words in *italic* were irrelevant.[2] A plea in an action of slander for charging the plaintiff with committing a felony, which admits the speaking of the words charged, but avers other facts in order to show that the words were not actionable, must show either that it appeared by the whole of defendant's statements, in the same conversation and company, that no felony had been committed, and therefore that there was no charge of felony, or that the charge was made known to the defendant by a third person, named in the plea, before he uttered the words.[3]

§ 359. If a material part of a plea of justification fails, the plea fails altogether.[4] Thus, in an action for libel, the declaration set out the whole of a long letter, in which the defendant imputed to the plaintiff improper conduct in various transactions which had taken place in reference to a ditch of the plaintiff's, alleged by the defendant to be a nuisance. The defendant pleaded "as to so much of the libel as related to, and charged the plaintiff with, the keep-

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[1] Starr *v.* Harrington, 1 Smith (Ind.), 360.

[2] Allen *v.* Crofoot, 7 Cow. 46.

[3] Parker *v.* McQueen, 8 B. Monr. 16. An averment that the plaintiff did falsely, fraudulently, and unlawfully alter a note, so as materially to change the terms and conditions thereof, is a good plea in justification of a charge of forgery. (Kerr *v.* Force, 3 Cranch C. C. 8.) It was held to be a justification of a charge of forgery, to show that the charge was intended to mean the altering of poll books, and that plaintiff had altered poll books. (Fellowes *v.* Hunter, 20 Up Can. Q. B. Rep. 382.)

[4] Cory *v.* Bond, 2 Fost. & F. 241; Holmes *v.* Jones, 3 N. Y. Supp. 156. A plaintiff is entitled to a general verdict. (*Id.*, and see Atkinson *v.* Detroit Free Press Co. 46 Mich. 341.)

ing of the nuisance," a plea which attempted to justify every sentence in the letter. The jury found that the plaintiff kept the ditch as a nuisance, but negatived the improper conduct imputed to the plaintiff in the letter. Held that, upon this finding, the plaintiff was entitled to a verdict.[1] Where the charge was that plaintiff had acted for spite *and lucre*, the defendant justified, but his justification failed as to *lucre*, held that the charge being *entire*, the plaintiff was entitled to a verdict,[2] and where a part only of a *divisible* charge is justified, the defendant is liable for the part not justified.[3] So where the charge was, He (plaintiff) has robbed me to a *serious amount*, the defendant, in addition to the general issue, as to the words he has robbed me, pleaded that plaintiff had robbed him (defendant) of a loaf of the value of three pence, the jury found the words as laid, and that the plea was true, but were directed to assess the plaintiff's damages for the words not justified, namely, "to a serious amount," and the court in banc held the direction proper.[4]

§ 360. In some States, by statute, a notice or specification of the defense is substituted for a plea or answer. Such a notice must, it seems, contain all the material allegations of a plea or answer.[5]

§ 361. In New York, and in some other States, by statute the defendant may, *in connection with a general denial*, and with or without a defense of justification, set up in his answer mitigating circumstances to reduce the

[1] Biddulph *v.* Chamberlayne, 17 Q. B. 351. Where, in an action for a libel in reference to an advertisement by plaintiff tending to injure defendants, his former partners, in their trade, defendant justified, and relied on the construction of such advertisement, as set out in the introductory part of the declaration; held, that that not supporting the inferences in the libel, plaintiff was entitled to recover. (Chubb *v.* Flannagan, 6 C. & P. 431.)

[2] Cory *v.* Bond, 2 Fost. & F. 241.

[3] Clarke *v.* Taylor, 3 Scott, 95.

[4] Bayley & Holroyd, JJ., in the Lancaster C. P.

[5] Van Derveer *v.* Sutphin, 5 Ohio St. 293: Brickett *v.* Davis, 21 Pick. 404; Shepard *v.* Merrill, 13 Johns. 475; Mitchell *v.* Borden, 8 Wend. 570; Bissell *v.* Cornell, 24 Wend. 354.

amount of damages.[1] But it would seem that a defendant cannot set up mitigating circumstances alone, without any other answer constituting a defense, because an answer merely setting up mitigating circumstances would not raise an issue.[2] Mitigating circumstances are such circumstances as the well-established rules of law allow to be given in evidence in mitigation of damages,[3] and what those circumstances are will be further considered under the head of Evidence (§§ 410–417). The question whether the facts set up are or are not such as should be permitted to be given in evidence in mitigation, is properly to be decided by the judge on the trial of the issue of fact.[4] And, therefore, although a plaintiff may move, prior to the trial, to strike out as irrelevant and redundant allegations of fact which the defendant avers he will prove on the trial in mitigation,[5] yet where there is any doubt as to whether or not the facts alleged in the answer would be received in evidence on the trial, the motion, prior to the trial, should be denied. Where a defendant seeks to mitigate damages by pleading facts and circumstances which induced him, at the time of making the charge, to believe it true, (1) the facts and circumstances must be such as would reasonably induce, in the mind of a person possessed of ordinary intelligence and knowledge, a belief of the truth of such charge; (2) it must also appear that the defendant, before and at the time of making the charge,

[1] N. Y. Code of Civ. Pro. §§ 535, 536; Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 N. Y. 67; Dolevin *v.* Wilder, 34 How. Pr. R. 488; 7 Robertson, 319; Van Benschoten *v.* Yaple, 13 How. Pr. R. 97; Heaton *v.* Wright, 10 *Id.* 79; Ayres *v.* Covill, 18 Barb. 260; Bennett *v.* Matthews, 64 Barb. 410. Mitigating circumstances must be pleaded. (Blanchard *v.* Lewis, 19 Week. Dig. 45; Calkins *v.* Colburn, 10 N. Y. St. Rep. 778.) Defendant may plead a general denial and mitigation. (Warner *v.* Lockerby, 31 Minn. 431.)

[2] Newman *v.* Otto, 4 Sandf. 669; Maretzek *v.* Cauldwell, 19 Abb. Pr. R. 40; but see Van Benschoten *v.* Yaple, 13 How. Pr. Rep. 97.

[3] Graham *v.* Jones, 1 Code Rep. N. S. 181; 6 How. Pr. R. 15; Blickenstaff *v.* Perrin, 27 Ind. 527.

[4] Newman *v.* Harrison, 1 Code Rep. N. S. 184; Fry *v.* Bennett, 5 Sandf. 54.

[5] Van Benschoten *v.* Yaple, 13 How. Pr. R. 97.

knew such facts and circumstances;[1] and (3) that he was, by reason of the facts and circumstances so set forth, induced to believe in the truth of the charge.[2] Unless it contains all these allegations, it may be stricken out on motion. Upon a motion to strike out, as redundant or irrelevant, matter set up in mitigation, the court is to see whether such matter can, by any possibility, be received in evidence; if it can, it should not be stricken out. It should not be stricken out if the court has the slightest doubt as to its inadmissibility.[3] In New York, the defendant on the trial can give in evidence only such matter of mitigation as he has set up in his answer, and if the answer does not contain any matter of mitigation, no evidence in mitigation can be admitted on the trial.[4] On an assess-

[1] Facts competent in mitigation must be such as were known to and believed by defendant when he made the publication. (Hatfield *v.* Lasher, 81 N. Y. 246; Willower *v.* Hill, 72 N. Y. 36; Barkley *v.* Copeland, 15 Pac. Rep. 307 [Cal.]; Hitchcock *v.* Moore, 37 No. West. Rep. 914; Morey *v.* Morning Jour. Asso. 17 N. Y. St. Rep. 266.)

[2] Kimball *v.* Herald Co. 21 Week. Dig. 34; Hamilton *v.* Eno, 81 N. Y. 116; and see *post*, § 411, *et seq.*

[3] Dolevin *v.* Wilder, 34 How. Pr. R. 488; 7 Robertson, 319; Gorton *v.* Keeler, 51 Barb. 475. Defendant published in his newspaper: "Dr. B. [plaintiff] makes a very bad book, and vends medicine to match." In an action for this publication, defendant answered in effect: (1) That plaintiff was engaged in vending worthless books and injurious and deceptive compounds as medicines; (2) That defendant, as a journalist, deemed it his duty to expose such deception; (3) That the books published by plaintiff, specifying them, were of an immoral and deceptive character; (4) That plaintiff prepared so-called medicines, specifying them, which were frauds and swindles, and that these allegations would be proved in justification and mitigation. The court refused to strike out these allegations as irrelevant. (Byrn *v.* Judd, 11 Abb. Pr. R. N. S. 390.) And in an action against a commercial agency for libel, the answer set up that defendants and a firm in the same business were under a mutual contract to furnish each other with information concerning the commercial standing of business men; that the alleged libelous words were telegraphed to said firm *in confidence* as a warning for the purposes of their business only, and for the purpose of eliciting from said firm correct information concerning plaintiffs for defendant's own use. Held such defense was neither irrelevant nor redundant, at least it was mitigating matter. (Jeffras *v.* McKillop & Sprague Co. 4 Sup. Ct. Rep. [T. & C.] 578; 2 Hun, 351.) Where defendant in his plea set forth in *hæc verba* two declarations in two other actions by the then plaintiff, the court ordered them to be struck out as an "oppressive incumbrance" on the record. (Spencer *v.* Tabele, 9 Johns. 130.)

[4] Knox *v.* Com'l Agency, 1 N. Y. St. Rep. 85; Willover *v.* Hill, 72 N. Y. 36; Moore *v.* Manuf. Bk. 21 N. Y. St. Rep. 652. If plaintiff gives evidence of facts not pleaded, defendant may prove mitigation not pleaded. (Reily *v.* Timme, 53 Wis. 63.) In In-

ment of damages, where there is no answer, matter in mitigation may be received. Although matter in mitigation of damages is not a subject of demurrer, yet if set up in the answer, without any allegation that it is set up in mitigation merely, the plaintiff may infer it is set up in bar, and may demur to it.[1]

§ 362. As in other actions, the defendant may demur to the complaint; but Lord Coke said, it was "an excellent point of learning in actions for slander" not to demur, but to take advantage of the declaration not disclosing a cause of action, either on the trial, or by motion in arrest of judgment.[2] It has been held that, though a count in slander contain some words which are actionable, and others which are not, the defendant cannot plead as to the former, and demur as to the residue, but must either plead or demur to the whole count.[3] But, again, it has been held, that where a libel contains several *distinct* charges, the defendant may plead or demur to particular parts of it; yet where several statements tend to one conclusion or im-

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diana, it is optional with defendant whether he will set up mitigating circumstances in his answer or not. (See O'Conner *v.* O'Conner, 27 Ind. 69.)

[1] Newman *v.* Otto, 4 Sandf. 668; Fry *v.* Bennett, 5 *Id.* 54; Matthews *v.* Beach, *Id.* 256; Meyer *v.* Schultz, 4 *Id.* 664; Stanley *v.* Webb, *Id.* 21.

[2] The great changes which, since Lord Coke's day, have taken place in the forms and mode of procedure, have deprived this rule of much of its value. If the words laid in the declaration are not actionable, the defendant must demur, or move in arrest of judgment. (Dorsey *v.* Whipps, 8 Gill, 457.) He cannot avail himself of the defect at the trial (Blunt *v.* Guntz, Anthon, 180; Boyd *v.* Brent, 3 Brevard, 241) to nonsuit the plaintiff. (Lumby *v.* Allday, 1 Cr. & J. 301; 1 Tyrw. 217.) It seems to be otherwise in New York, where, on the trial, defendant may insist that the complaint does not disclose a cause of action. It must be remembered that in New York the demurrer is general only, and that the special demurrer has been superseded by a motion to make definite and certain. In Mississippi and Virginia, no demurrer is allowed.

[3] Bronson, J., Root *v.* Woodruff, 6 Hill, 420, citing as to libel, Sterling *v.* Sherwood, 20 Johns. 204; Riggs *v.* Denniston, 3 Johns. Cas. 198; and saying the same rule had been applied in actions for slander, though not reported; and see Taylor *v.* Carr, 3 Up. Can. Q. B. Rep. 306. It is conceded that the rule is otherwise in England, and Clarkson *v.* Lawson (6 Bing. 587), is cited. Held that a defendant may demur to a part of the words laid in a count for slander. (Abrams *v.* Smith, 8 Blackf. 95; Wyant *v.* Smith, 5 *Id.* 294.)

putation, it is not permissible to select and deal separately with one, either by plea or demurrer.[1] A defendant cannot single out some of the words in a declaration and demur to them.[2] If a count by husband and wife contains words actionable *per se*, as well as others spoken of the wife, the defendant cannot demur, but may, on the trial, object that the action for the latter words cannot be maintained by both.[3] In an action for libel, the answer contained (1) a denial of the publication, (2) a justification. The plaintiff demurred to the answer, specifying only objections to the matter of justification, and judgment was given for the plaintiff on the demurrer; held that the denial remained on the record, and raised an issue of fact.[4] Upon demurrer to the complaint, if any of the words be actionable, there must be judgment for the plaintiff.[5] A demurrer to the complaint does not admit the intent attributed by the innuendo;[6] but it admits the allegation that the publication was false and malicious.[7]

A question has been raised whether where an answer of justification on the ground of truth, is supposed to be defective because it merely alleges that the charge is true instead of stating the facts relied upon to show it to be true, the plaintiff can demur to such answer. We presume that in such a case a motion to make definite and not a demurrer is the proper remedy.[8]

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[1] Eaton *v.* Johns, 1 Dowl. Pr. Cas. N. S. 602; and see McGregor *v.* Gregory, 2 *Id.* 769; 11 M. & W. 289.

[2] Taylor *v.* Carr, 3 Up. Can. Q. B. Rep. 306.

[3] Beach *v.* Ranney, 2 Hill, 309.

[4] Matthews *v.* Beach, 8 N. Y. 173; but see Parrett Nav. Co. *v.* Stower, 8 Dowl. Pr. Cas. 405.

[5] Edds *v.* Waters, 4 Cr. C. C. 170; Butler *v.* Wood, 10 How. Pr. Rep. 222.

[6] Wheeler *v.* Hayes, 1 Perr. & D. 55. The head note to Smith *v.* Tribune Co. (4 Bissell, 477) is not warranted by the text. (Fleischman *v.* Bennett, 87 N. Y. 231.) The demurrer admits only the publication and falsity of the charge. (Kennedy *v.* Press Pub. Co. 3 N. Y. State Rep. 139.) On demurrer the court passes upon the effect of the language. (Donaghue *v.* Gaffey, 53 Conn. 43; 54 *Id.* 257; see § 274, *ante*.)

[7] Dodge *v.* Colby, 108 N. Y. 445; Cochrane *v.* Melendy, 59 Wis. 207. Upon demurrer to a complaint "the defendant is *prima facie* to be considered as a wrong doer." (Ashurst, J., J'Anson *v.* Stuart, 1 T. R. 748.)

[8] See Van Wyck *v.* Guthrie, 4 Duer, 474. The right to demur to an

§ 362 *a*. There cannot be a counter-claim in an action of slander or libel.[1] One libel cannot be set off against another,[2] nor can damages occasioned by a libel form a counter-claim in an action for an assault.[3] In New York, no replication is necessary unless to a counter-claim.[4] In England, a general reply only is required.

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answer is limited (N. Y. Code of Civ. Pro. § 494) to a defense consisting of new matter. A defense of truth is not new matter. (Maretzek *v.* Cauldwell, 19 Abb. Pr. R. 35.) Upon a demurrer to an answer plaintiff may attack the complaint. (The People *v.* Booth, 32 N. Y. 397.)

[1] Fellerman *v.* Dolan, 7 Abb. Pr. R. 395, note; Richardson *v.* Northup, 56 Barb. 105; Schnaderbeek *v.* Worth, 8 Abb. 37; Barhyte *v.* Hughes, 33 Barb. 320.

[2] Seely *v.* Cole, Wright (Ohio), 681; Battell *v.* Wallace, 30 Fed. Rep. 229. In the Scotch Reports are to be found numerous instances of one set of words being set off against another. In England a counter claim is allowed in actions for slander or libel (Flood on Libel, 324), and "*addenda et corrigenda*" where in slander a counter claim in trespass was allowed. And in Lewsay *v.* Fletcher, a resident of Java sued in an English Court for commissions, the defendant was allowed to counter claim damages for an alleged libel. (And see Quinn *v.* Hession, 40 L. T. 70; 4 L. R. [Ir.] 35; Rotherham *v.* Priest, 28 Week. Rep. 277; Crowe *v.* Barnicot, 37 Law Times Rep. 68; Odgers on Libel, 494.)

[3] Macdougall *v.* Maguire, 35 Cal. 274.

[4] N. Y. Code of Civ. Pro. § 514; Stat. 6 & 7 Vict. ch. 96; Chadwick *v.* Herapath, 4 Dowl. & L. 653; 16 Law Jour. C. P. 104; Helsham *v.* Blackwood, 11 C. B. 111.

CHAPTER XV.

VARIANCE.—AMENDMENT.

Allegation of pleadings and proof should correspond—Variance in New York—General rules as to variance—Immaterial variance—Material variance—Amendment.

§ 363. The general rule as to variance is, that the allegations of the pleading and the proof must correspond, otherwise there is a variance, and the plaintiff fails;[1] but now, in New York, it is enacted by statute that no variance between the allegation in a pleading and the proof shall be deemed "*material* unless it has actually misled the adverse party to his prejudice," and where there is a variance, the court may order an amendment.[2] The following decisions upon variance are in cases not within the Code of New York.

§ 364. Ordinarily it is sufficient if the words proved correspond substantially with those alleged.[3] But although any mere variation of the form of expression is not material, the words alleged cannot be proved by showing that the defendant published the same meaning in different words,[4] even if equivalent and of similar im-

[1] In actions of slander and libel the language charged must be proved as laid. (Birch *v.* Benton, 26 Mo. [5 Jones], 153; Horton *v.* Reavis, 2 Murph. 380.) A variance is fatal. (Stanfield *v.* Boyer, 6 Har. & J. 248; Winter *v.* Donovan, 8 Gill, 370; Harris *v.* Lawrence, 1 Tyler, 156.) It is not sufficient to prove the substance of the charge merely. (Rex *v.* Berry, 4 T. R. 217.) Proof that the language related to others besides the plaintiff is not a variance. (Robinett *v.* McDonald, 65 Cal. 611.)

[2] N. Y. Code of Civ. Pro. § 539. As to amendment of variance in Indiana (Proctor *v.* Owens, 18 Ind. 21).

[3] Coghill *v.* Chandler, 33 Mo. 115; Smith *v.* Hollister, 3 Shaw (Vt.), 695; Taylor *v.* Moran, 4 Metc. (Ky.) 127; Williams *v.* Miner, 18 Conn. 464; Desmond *v.* Brown, 29 Iowa, 53; Bundy *v.* Hart, 46 Mo. 460.

[4] Smith *v.* Hollister, 3 Shaw (Vt.), 695; Ward *v.* Dick, 47 Conn. 300. Within six months before suit brought, defendant said concerning the words alleged to be actionable, but which

port.[1] A count for slanderous words spoken affirmatively is not supported by proof that they were spoken by way of interrogation.[2] Proof of words spoken in the second person will not support counts for words spoken in the third person, and *vice versa*.[3] Proof of words spoken in the past tense will support a charge of words in the present.[4] Proof of a positive assertion is not admitted under an allegation of a hypothetical assertion; an allegation that the words were "he swore to a lie" is not supported by proof that the words were "he swore to a lie *if* he swore as Jones said he did."[5]

§ 365. The plaintiff need not prove all the words laid, but he must prove enough of them to sustain the action.[6]

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were barred by the statute, "I never denied what I have said, and I will stand up to it." Held, that this was not a repetition of what he had previously said, and that an action could not be sustained thereon. (Fox. *v.* Wilson, 3 Jones Law [N. Car.], 485.)

[1] Wilborn *v.* Odell, 29 Ill. 456; Taylor *v.* Moran, 4 Metc. (Ky.) 127; Norton *v.* Gordon, 16 Ill. 38. It is not sufficient to prove words equivalent to those alleged. (Moore *v.* Bond, 4 Blackf. 458; Slocumb *v.* Kuykendall, 1 Scam. 187; Olmsted *v.* Miller, 1 Wend. 506; Watson *v.* Musick, 2 Mo. 48; Armitage *v.* Dunster, 4 Doug. 291; McConnell *v.* McKenna, 10 Ir. C. L. R. 511; Campagnon *v.* Martin, 2 W. Black. 790.) Words to the same effect are not the same words. (Fox *v.* Vanderbeck, 5 Cow. 513.)

[2] Barnes *v.* Holloway, 8 T. R. 150; Sanford *v.* Gaddis, 15 Ill. 228; King *v.* Whitley, 7 Jones Law (N. Car.), 529. If in an action of slander the words be proved to be spoken affirmatively as they are laid, the charge is supported, though it appear that they were spoken in answer to a question put by a third person. (Jones *v.* Chapman, 5 Blackf. 88.)

[3] Cock *v* Weatherby, 5 Smedes & Marsh, 333; Miller *v.* Miller, 8 Johns. 74; Stannard *v.* Harper, 5 M. & Ry. 295; M'Connell *v.* McCoy, 7 S. & R. 223; Culbertson *v.* Stanley, 6 Blackf. 67; Williams *v.* Harrison, 3 Mo. 411; Wolf *v.* Rodifer, 1 Har. & J. 409; Abarillo *v.* Rogers, Bull. N. P. 5; Rex *v.* Berry, 4 T. R. 217; Phillips *v.* Odell, 5 Up. Can. Q. B. Rep. O. S. 483; Sanford *v.* Gaddis, 15 Ill 228; Rutherford *v.* Moore, 1 Cr. C. C. 388; Birch *v.* Simms. *Id.* 550. Evidence of the words, "You are a broken-down justice," does not support an indictment for speaking of the magistrate the words, "He is a broken-down justice." (4 T. R. 217; but see Cro. Eliz. 503.) Words proved to have been spoken in the second person sustain a count for slander in which the words are in the third person. (Dailey *v.* Gaines, 1 Dana, 529; Huffman *v.* Shumate, 4 Bibb, 515.)

[4] Buscher *v.* Scully, 107 Ind. 246. Allegation of English words not sustained by proof of German words. (Stichtd *v.* The State, 8 So. West. Rep. 477.)

[5] Evarts *v.* Smith, 19 Mich. 55; § 369, *post*.

[6] Fox *v.* Vanderbeck, 5 Cow. 513; Purple *v.* Horton, 13 Wend. 9; Nestle *v.* Van Slyck, 2 Hill, 282; Skinner *v.* Grant, 12 Vt. 456; Scott *v.* McKinnish, 15 Ala. 662; Hancock *v.* Stephens, 11 Humph. 507; Iseley *v.*

It is sufficient if the gravamen of the charge as laid is proved,[1] and unless the additional words qualify the meaning of those proved so as to render the words proved not actionable, the proof is sufficient.[2] It is necessary for the plaintiff to prove some of the words precisely as charged, but not all of them, if those proved are in themselves slanderous; but he will not be permitted to prove the substance of them in lieu of the precise words.[3] Where the whole of the words laid in any one count constitute the slanderous charge, the whole must be proved. But where there are distinct slanderous allegations in any count, proof of any of them is sufficient.[4] The plaintiff may prove more words than are set forth in the complaint, provided the additional words do not change the meaning

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Lovejoy, 8 Blackf. 462; Sanford *v.* Gaddis, 15 Ill. 228; Whiting *v.* Smith, 13 Pick. 364; Loomis *v.* Swick, 3 Wend. 205; Wheeler *v.* Robb, 1 Blackf. 330; Chandler *v.* Holloway, 4 Port. 17; Berry *v.* Dryden, 7 Mo. 324; Coghill *v.* Chandler, 33 Mo. 115; Geary *v.* Connop, Skin. 333; Pennington *v.* Meeks, 46 Mo. 217. It is sufficient if the gravamen of the charge laid be proven. (Dufreene *v.* Weise, 46 Wis. 290; Albin *v.* Parks, 2 Bradw. [Ill.] 576; Humbard *v.* The State, 21 Texas App. 200; Mix *v.* McCoy, 4 West [Mo. App.], 894; Schoonhoven *v.* Beach, 23 Week. Dig. 348; Nichols *v.* Hayes, 13 Conn. 163.) Where it is alleged that defendant charged plaintiff with sleeping with another man than her husband, and the proof is that he charged that such a person was in bed with her, held no variance. (Barnett *v.* Ward, 36 Ohio St. 107.)

[1] Hersh *v.* Ringwalt, 3 Yeates, 508; Wilson *v.* Natrous, 5 Yerg. 211; Cheadle *v.* Buell, 6 Ham 67; Purcell *v.* Archer, Peck (Tenn.), 317; Miller *v.* Miller, 8 Johns. 74; Cooper *v.* Marlow, 3 Mo. 188; Barr *v.* Gaines, 3 Dana, 258; McClintock *v.* Crick, 4 Iowa, 453; Baldwin *v.* Soule, 6 Gray, 321; Scott *v.* McKinnish, 15 Ala. 662; Bassett *v.* Spofford, 11 N. Hamp. 127; Merrill *v.* Peaslee, 17 N. Hamp. 540.

[2] Sanford *v.* Gaddis, 15 Ill. 228; Merrill *v.* Peaslee, 17 N. Hamp. 540; Smart *v.* Blanchard, 42 N. Hamp. 137. Plaintiff need not prove all the words set forth in the declaration, provided he proves enough to sustain his cause of action, and the words proved do not differ in sense from those alleged. (Nichols *v.* Hayes, 13 Conn. 155; Nestle *v.* Van Slyck, 2 Hill, 282; McKee *v.* Ingalls, 4 Scam. 30; Scott *v.* Renforth, Wright, 55.)

[3] Easley *v.* Moss, 9 Ala. 266; Morgan *v.* Livingston, 2 Rich. 573; Creelman *v.* Marks, 7 Blackf. 281; Patterson *v.* Edwards, 2 Gilman, 720. Although the libel read in evidence contained matter in addition to that set out in the declaration, there is no variance if the additional part do not alter the sense of that which is set out. (M'Coombs *v.* Tuttle, 5 Blackf. 431; Cooper *v.* Marlow, 3 Mo. 188; Rutherford *v.* Evans, 6 Bing. 451; 4 Car. & P. 74.) Thus, in Tabart *v.* Tipper (1 Camp. 350), the rhymes (see *ante*, note 4, p. 457) were set out in the declaration without the line in Latin which followed them; it was held the omission was immaterial.

[4] Flower *v.* Pedley, 2 Esp. 491.

of those set forth,[1] and words spoken at different times may be given in evidence on one count.[2]

§ 366. An action for slanderous words imputing to the plaintiff misconduct as a constable is not sustained by proving words imputing misconduct to him, as an agent of the executive of one State, for the arrest, in another State, of a fugitive from justice.[3] Where the words were alleged to have been spoken of and concerning the plaintiff as treasurer and collector of certain tolls, and the innuendo corresponding thereto, and the proof was only of his being treasurer, and he failed in making out his appointment to be collector; held, that for want of such proof he was properly nonsuited.[4] For words spoken of a physician, alleging that he was not entitled to practice as such; held, first that the plaintiff was bound to prove not only that he practiced as a physician, but that he practiced *lawfully*.[5] In an action for these words spoken by defendant of the plaintiff in his profession as a physician: "Dr. S. has upset all we have done, and die he (the patient) must," it was proved that the plaintiff had practiced several years as a physician, and having been called in during the absence of a physician who with the defendant attended the patient, the defendant, as apothecary, made up the medicines prescribed by the plaintiff for the patient in question. *Quære*, whether, on this declaration, it was necessary for the plaintiff to produce a diploma, or other direct evidence

[1] Wilborn *v.* Odell, 29 Ill. 456. In Bourke *v.* Warren (2 C. & P. 307), a letter was set out as inducement alleged to contain "the words and matters following;" when the letter was read it was found to contain all that was stated in the declaration and something more; held not a material variance—of course the something more did not qualify what went before. (And see Morrow *v.* McGaver, 1 Ir. C. L. R. N. S. 579.) In Crotty *v.* Morrissey (40 Ill. 477), held no variance between "he stole $200 from me," and "he stole $200 from me when I was drunk," but that there was a variance between "he stole part of the money he collected in the Catholic church," and "he stole part of the money he collected in the Catholic church in Seneca."

[2] Charlter *v.* Barret, Peake Cas. 32.

[3] Kinney *v.* Nash, 3 N. Y. 177.

[4] Sellers *v.* Till, 4 B. & Cr. 655; Sellers *v.* Killew, 7 D. & Ry. 121.

[5] Collins *v.* Carnegie, 3 Nev. & M. 703; 1 Ad. & El. 695.

that he had taken a degree in physic, in order to maintain the action.[1] Where the declaration alleged the plaintiff to be an attorney, and that the words were spoken of him in his professional character, the words being actionable without any reference to such character; held, that mere proof of his having been admitted, without showing that he had practiced or had taken out his certificate, was not a fatal variance.[2]

§ 367. The following have been held to be immaterial variances: the date of publication;[3] a difference in the tense of the words, as *had* for *has;*[4] the transposition of the names of the parties to the suit, as a witness in which the plaintiff was charged with having sworn falsely;[5] alleging that the offense was committed on Saturday instead of Sunday;[6] a discrepancy in the title of a paper;[7] where it was alleged that the publication was in the presence of B., held not necessary to prove such allegation.[8] On an allegation that the defendant charged the plaintiff with perjury in a suit of A. and B. *v.* C. and D., the variance is not fatal if it be shown that the charge was made in reference to the case of a cross-bill, by one of the defendants in such case, against the complainant and co-defendants.[9] And

[1] Smith *v.* Taylor, 1 N. R. (4 Bos. & Pul.) 196. In an action by an apothecary, what is sufficient proof of his qualifications as such. (Wogan *v.* Somerville, 1 Moor, 102; 7 Taunt. 401.)

[2] Lewis *v.* Walter, 3 B. & Cr. 138, note *b*; 4 D. & R. 810.

[3] Thrall *v.* Smiley, 9 Cal. 529; Gates *v.* Bowker, 18 Vt. (3 Washb.) 23; Commonwealth *v.* Varney, 10 Cush. 402; Potter *v.* Thompson, 22 Barb. 89.

[4] Wilborn *v.* Odell, 29 Ill. 456.

[5] Teague *v.* Williams, 7 Ala. 844. In an action of slander, plaintiff alleged that the slanderous words were spoken relative to testimony of plaintiff in a suit in which S. was plaintiff and H. defendant. Held, that evidence *aliunde* was admissible to show that the record of an action by S. and W. against H. was the action referred to in the declaration, and that there was no variance. (Hibler *v.* Servoss, 6 Mo. 24.

[6] Sharpe *v.* Stephenson, 12 Ired. 348.

[7] The State *v.* Jeandell, 5 Harring. 475.

[8] Goodrich *v.* Warner, 21 Conn. 432. But where the allegation was a speaking in the hearing of "divers citizens," and the proof was of a speaking in the hearing of one person, and he not a citizen, it was held a fatal variance. (Chapin *v.* White, 102 Mass. 139.)

[9] Wiley *v.* Campbell, 5 T. B. Monr. 560. A charge of false swear-

where the declaration on a libel stated that certain prosecutions had been preferred against M., and that, "in furtherance of such proceedings," certain sums of the parish funds had been appropriated to discharge the expenses; but the libel charged the money to have been so applied after the proceedings had terminated; held, that it being immaterial to the defamatory character of the libel when the money was so applied, the variance was immaterial.[1] So a slight variance in the names of the defendants in the indictment, as set forth in the declaration and contained in the record, may be cured by parol proof of the identity of the persons.[2] Where the words charged in one count were "He is a thief," and in another, "He is a thief, and stole the hay and hay-seed from D.'s barn," and the proof was that the defendant said, at one time, that he was "a thief, and stole the hay-seed out of the barn," and at another that he had "stolen hay and hay-seed that had belonged to D.," it was held that the words charged were sufficiently proved.[3]

§ 368. The following are additional instances of immaterial variance:

ALLEGATION.	PROOF.
He stole hogs.	He stole a hog.[4]
The girl that *hired* with us.	The girl that *lived* with us.[5]

ing, in a proceeding between A. & B., held sustained by proof of a proceeding between A. & B. and wife. (Dowd *v.* Winters, 20 Mo. [5 Bennett]. 361.)

[1] May *v.* Brown, 3 B. & Cr. 113; 4 D. & R. 670. It is a general rule that the variance between the allegation and the proof will defeat a party, unless it be in respect of matter which, if pleaded, would be material. (*Id.*) Where the words are actionable without the inducement, the insertion of what is not material and not proved does not occasion a variance of which advantage can be taken. (Cox *v.* Thompson, 2 Cr. & J. 361; 2 Tyrw. 411.)

[2] Hamilton *v.* Langley, 1 McMullan, 498.

[3] Williams *v.* Miner, 18 Conn. 464.

[4] Barr *v.* Gaines, 3 Dana. 258.

[5] Robinett *v.* Ruby, 13 Md. 95.

ALLEGATION.	PROOF.
A. committed forgery.	A. and B. committed forgery.[1]
We supposed that they had become aware of the fact.	We supposed that they had by this time become aware of the fact.[2]
He stole my staves and nails.	He is a damned rogue, for he stole my staves and nails, and I can prove it.[3]
She has had a bastard child.	If I have not been misinformed, she had a bastard child.[4]
A. has had a baby.	We hear bad reports about some of your girls; A. has had a baby.[5]
He is a *strong* thief.	He is a thief.[6]
He has been working for me some time, and has been robbing me all the while.	He has worked for me some time, and has been continually robbing me.[7]
You are perjured.	Are you not afraid, as you have perjured yourself?[8]
Mr. K.'s wife is a whore.	She (Mr. K.'s wife) is a whorish bitch.[9]

[1] Nichols *v.* Hayes, 13 Conn. 155. But words spoken of a husband or of a wife will not support an allegation of words spoken of both of them. (Davis *v.* Sherron, 1 Cr. C. C. 287.)

[2] Smiley *v.* McDougall, 10 Up. Can. Q. B. Rep. 113.

[3] Pasley *v.* Kemp, 22 Mo. (1 Jones), 409.

[4] Treat *v.* Browning, 4 Conn. 408. The words alleged were "Plaintiff was in the family way, and R. took her to Chicago to have the child worked off." The proof that defendant said "Plaintiff was in the family way by Tom. Bell," not a material variance. (Baker *v.* Young, 44 Ill. 42.)

[5] Robbins *v.* Fletcher, 101 Mass. 115.

[6] Burgis's Case, Dyer, 75.

[7] Dancaster *v.* Hewson, 2 Man. & Ry. 176.

[8] Commons *v.* Walters, 1 Port. 377.

[9] Scott *v.* McKinnish, 15 Ala. 662

ALLEGATION.	PROOF.
You stole *one* of my sheep.	You stole my sheep and killed *it*.[1]
Riot.	Riot and assault.[2]
Poppenheim is a very bad man; he is a calf-thief, and the records of the court will prove it.	Poppenheim is a very bad man; he is a calf-thief; he has been indicted for calf-stealing, and the records of the court will prove it.[3]
Your (plaintiff's) house is a bawdy-house, and no respectable person will live in it.	You (plaintiff's wife) are a nuisance to live beside of. You are a bawd, and your house no better than a bawdy-house.[4]
Ware Hawk, you must take care of yourself there, *mind what you are about.*	Ware Hawk, you must take care of yourself there.[5]

§ 369. It was held a material variance where the declaration alleged that the defendant charged the plaintiff with a crime, and the proof disclosed merely that defendant said he supposed the plaintiff to be guilty of such crime.[6] Where the declaration charged the defendant with speaking slanderous words, and the proof was that he procured another to speak them;[7] where the declaration charged the defendant with speaking defamatory words, and the proof was that defendant signed a written complaint

[1] Robinson *v.* Willis, 2 Stark. Rep. 194; the word *it* showing that only one sheep was meant.

[2] Hamilton *v.* Langley, 1 McMullan, 498.

[3] Poppenheim *v.* Wilkes, 1 Strobh. 275.

[4] Huckle *v.* Reynolds, 7 C. B. N. S. 114.

[5] Orpwood *v.* Barkes, 4 Bing. 261; s. c. Orpwood *v.* Parkes, 12 Moore, 492.

[6] Dickey *v.* Andros, 32 Vt. (3 Shaw), 55. Where, in case for a malicious prosecution, the delaration alleged that an express charge of felony was made against plaintiff, but it appeared that defendant had only deposed to a suspicion that he had committed it, held no variance, it being the only meaning which could be imputed to the accusation. (Davis *v.* Noake, 6 Maule & S. 29.)

[7] Watts *v.* Greenlee, 1 Dev. 210.

charging the plaintiff with larceny;[1] where the declaration charged the defendant with saying that plaintiff, a single woman, had had a child, and the proof was that defendant said, in his opinion plaintiff was pregnant with child.[2] An allegation of slander as to the cleanliness of the person of plaintiff (a cook), as of the defendant's actual knowledge, held, not supported by proof of words as to the defendant's belief or understanding only.[3] An allegation that words were spoken concerning three plaintiffs (partners) in their joint trade, is not supported by proof that the words were addressed to one of the plaintiffs personally.[4] Where the words set forth, in their ordinary sense, import a charge of crime, if they are proved to have been so spoken in connection with other words as to rebut the idea of criminalty, there is a fatal variance;[5] and where an innuendo gives a specific meaning to the language published, that meaning must be proved, or there will be a variance.[6] Where the declaration in an action of slander alleges that the words spoken were in reference to an oath taken by plaintiff before the register and receiver of a land office, touching the entry of land, proof of an oath taken before a notary public concerning the same subject-matter, does not support the allegation;[7] and where the declaration for maliciously

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[1] Hill *v.* Miles, 9 N. Hamp. 9.

[2] Payson *v.* Macomber, 3 Allen (Mass.), 69. A count in slander, alleging that defendant charged upon plaintiff an act of fornication, witnessed by a particular person, is not sustained by proof of words charging an act of fornication witnessed by another person, or by proof of words implying a charge of habitual fornication and lewdness with the person named in the declaration. (*Id.*)

[3] Cook *v.* Stokes, 1 M. & Rob. 237.

[4] Solomons *v.* Medex, 1 Stark. Rep. 191; and see Davis *v.* Sherron, 1 Cr. C. C. 287.

[5] Edgerly *v.* Swain, 32 N. Hamp. 478.

[6] Williams *v.* Stott, 3 Tyrw. 668; *ante*, § 338. In a declaration for slander the words charged to have been published were, "You have murdered your little girl;" innuendo the infant daughter of plaintiff. On the trial it appeared that the child was illegitimate, but that the plaintiff was *in fact* the father. It was objected that the innuendo implied a child born in wedlock, and that there was a variance. The objection was sustained, and plaintiff was nonsuited. (Foote *v.* Rowley, 2 Law Rep. 138, in Appendix, *post.*)

[7] Phillips *v.* Beene, 16 Ala. 720.

charging the plaintiff with felony stated that the defendant went before R. C. Baron *Waterpark*, of *Waterfork*, in the county of, &c., and the proof was that his title was Baron Waterpark, of *Waterpark*, &c.; held a fatal variance.[1] Where the libel given in evidence contained two references (showing it to be the language of a third person respecting the plaintiff), and which were omitted in the libel set forth in the declaration; held, that the meaning of the paragraphs being different, the variance was fatal.[2] An action upon a libel charging in one count that the defendant published it as purporting to be a letter from A. to B., and in another charging generally that the defendant published the libelous matter; held not to be sustained by proof of a publication wherein the defendant stated that in a debate in the Irish House of Commons several years before, the attorney general of Ireland had read such a letter, and then stating the libelous matter as said by him in commenting upon that letter; for it was said the characters of the several libels were essentially different, though the slander imputed might be the same.[3] Where the libel given in evidence was contained in a book published by the defendant respecting William Cobbett, entitled "The Book of Wonders," and was as follows: "Many well intentioned persons have expressed their surprise that the *enlightener* should have been willing to accept of a seat in corruption's den purchased with the bank notes of a man whose incapability and baseness he had so powerfully exposed. To convince such persons that such line of conduct was strictly patriotic, we have only to assure them that in so doing, he was walking in the footsteps of that venerable veteran whose creed is the criterion of excellence (see No. 195), and who, in an article of that creed, has laid it down as a maxim that we must, in fighting the

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[1] Walters *v.* Mace, 2 B. & Ald. 756; 1 Chit. 507.

[2] Tabart *v.* Tipper, 1 Camp. 353.

[3] Bell *v.* Byrne, 13 East, 554.

enemy, not reject the use of even despicable and detestable men. Cobbett, v. 32, p. 82." The libel, as set forth in the declaration, omitted the words and figures, "see No. 195," and "Cobbett, v. 32, p. 82." It was held a fatal variance; for, upon reading the declaration, the libel would be understood to mean that the defendant had himself made the assertions respecting the plaintiff, but from the libel itself it appears that the paragraph was written with intent to expose the conduct, not of the plaintiff, but of another person.[1]

§ 370. An indictment for a libel charged that the defendant set up, in public, a board on which a painting or picture of a human head, with a nail driven through the ear, and a pair of shears hung on a nail, and the proof was that a human head, showing a side face, with an ear, a nail driven through the ear, and a pair of shears hung on the nail, was inscribed or cut in the board by means of some instrument, but was not painted. Held, that there was a fatal variance between the allegation and the proof, and that the defendant must be acquitted.[2] In an action of slander, one of the counts charged the defendant with having made a voluntary affidavit, and caused certain false statements to be written therein, to wit: "that there was a certain quantity of American soap, which, to his certain knowledge was sold at Curacoa (by the plaintiff), at six dollars, current money." The affidavit, as offered in evi-

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[1] Cartwright *v.* Wright, 5 B. & Ald. 615. Where the words alleged were, "My sarcastic friend by leaving out," &c., and the proof was," "My sarcastic friend *Moros*, by leaving out," &c., held a material variance (Tabart *v.* Tipper, 1 Camp. 350); leaving out the words "of" and "which," although they did not materially alter the sense, held a variance. (Cooke *v.* Smith, McClel. 250.) The words complained of were, Tell Gilpin I have prohibited Mr. Rainy (plaintiff) from practicing in my court, and the proof was that to these words were added, "until he apologizes for his conduct towards me on the bench," held a material variance. And it made no difference that the words as qualified were still actionable. (Rainy *v.* Bravo, 20 Weekly Rep. [London], 873.)

[2] The State *v.* Powers, 12 Ired. 5.

dence by the plaintiff, stated the same words, except that the words "per box" were added after the words "six dollars." Held, that the variance was fatal.[1] The averment was that A., before a magistrate, maliciously charged B. with felony; the information contained a mere charge of tortious conversion, upon which a warrant for felony was improperly founded. The variance was held fatal.[2] If a declaration count upon a charge of perjury upon a particular occasion, proof of a general charge of perjury is inadmissible to sustain it.[3]

§ 371. The following are additional instances of material variance:

ALLEGATION.	PROOF.
Whore.	Strumpet.[4]
That the plaintiff, who was postmaster at F., embezzled certain papers.	Defendant had no doubt the papers were embezzled at F., or he thought the papers were embezzled at F.[5]
L. is pregnant and gone with child seven months.	Have you heard anything about L.'s being pregnant by Dr. P.[6]

[1] Wilson *v.* Mitchell, 3 Har. & J. 91.

[2] Tempest *v.* Chambers, 1 Stark. Rep. 67. In slander the allegation was, He burnt Knox's barn. The proof was that defendant added, Because one of the girls would not marry him. It was doubted if a variance. Where the inducement was of a conversation of Mr. Knox's barn which had been burnt, and that defendant said of plaintiff and of said barn, He burnt Knox's barn; proof that defendant spoke the words, He burnt Knox's barn, without proof of the colloquium respecting the burning of Mr. Knox's barn, was held insufficient. (Manly *v.* Corry, 3 Up. Can. Q. B. R. 380.)

[3] Emery *v.* Miller, 1 Denio, 208.

[4] Williams *v.* Bryant, 4 Ala. 44; *contra*, see Cook *v.* Wingfield, 1 Stra. 555; *ante*, note 1, p. 190. A charge of being "a whore and common prostitute," is not supported by proof of words amounting to a general charge of unchastity. (Doherty *v.* Brown, 10 Gray [Mass.], 250; see *ante*, p. 592, note 5; and Frisby *v.* The State, 9 So. West. Rep. 463 [Texas].)

[5] Taylor *v.* Kneeland, 1 Doug. [Mich.] 67.

[6] Long *v.* Fleming, 2 Miles, 104.

ALLEGATION.	PROOF.
Dr. F. is not a physician but a twopenny bleeder.	If Dr. F. is a twopenny physician, I am none. I am a regular graduate, and no quack.[1]
He burnt my barn, innuendo feloniously burnt.	There is a man that burnt my barn; if he was not guilty of it, he would not carry pistols.[2]
He stole wheat last winter.	He, defendant, said he, plaintiff, stole away the wheat in the night, and I was well aware of it, and would have put him in jail for doing it.[3]
Thief.	Plaintiff had been robbing him.[4]
That persons who would otherwise have retained and employed the plaintiff, wholly declined and refused so to do.	That other persons would have recommended the plaintiff, and that the persons named in the declaration would have employed plaintiff on such recommendation.[5]
You swore false.	You have sworn false.[6]
She is a great thief.	She is a bad one.[7]
That plaintiff then had three or four vessels in the river.	That plaintiff had given out that there were three or four vessels in the river.[8]

[1] Foster *v.* Small, 3 Whart. 138.
[2] Van Keuren *v.* Griffis, 2 Up. Can. Q. B. Rep. 380.
[3] McNaught *v.* Allen, 8 Up. Can. Q. B. Rep. 304.
[4] Stern *v.* Lowenthal, 19 Pac. Rep. 579 (Cal.).
[5] Sterry *v.* Foreman, 2 Car. & P. 592.
[6] Sanford *v.* Gaddis, 15 Ill. 228.
[7] Hancock *v.* Winter, 2 C. Marshall, 502.
[8] Wood *v.* Adam, 6 Bing. 418; 4 C. & P. 268.

ALLEGATION.	PROOF.
This is my umbrella. He stole it from my backdoor.	It is my umbrella. He stole it from my backdoor.[1]
Stolen.	*Taken* out of my yard.[2]
You robbed the mail.	I am not like you, running about the country with forged deeds and robbing the mail, as you did.[3]
Plaintiff had sworn a lie, and it is in him, for he had sworn what he, defendant, could prove to be a point-blank lie.	Plaintiff had sworn off a just account, and that he, defendant, could or would prove it.[4]
You would steal, and you will steal.	A man that would do that would steal.[5]
I, defendant, was summoned as a grand juror at last court, but I got the court to excuse me from serving, for if I had served I would have been bound to have indicted W. for theft.	If I, defendant, had served on the grand jury, I would have been bound to have indicted Mr. Street, the plaintiff.[6]
Mismanagement or ignorance.	Ignorance or inattention.[7]
There was a collusion between A., B., and C.	There was a collusion between A. and B.[8]

[1] Walters *v.* Mace, 2 B. & Ald. 756: 1 Chit. 507. The allegation concerned a thing present, and the proof a thing not present.

[2] Shepherd *v.* Bliss, 2 Stark. Rep. 510.

[3] McBean *v.* Williams, 5 Up. Can. Q. B. Rep. O. S. 689.

[4] Berry *v.* Dryden, 7 Mo. 324.

[5] Stees *v.* Kemble, 27 Penn. St. Rep. 112.

[6] Street *v.* Bushnell, 24 Mo. (3 Jones), 328.

[7] Brooks *v.* Blanshard, 1 Cr. & M. 779; 3 Tyrw. 844.

[8] Johnson *v.* Tait, 6 Binn. 121.

ALLEGATION.	PROOF.
You stole a dollar from A.	You stole a dollar from B.[1]
Venereal disease.	Disgraceful disease.[2]

§ 372. In New York, under Code of Civil Procedure, great latitude of amendment is allowed; besides the right to amend once of course, the court may order an amendment before or upon the trial, or at any time thereafter.[3] Prior to the Code of Procedure, a plaintiff was allowed to amend his inducement after issue, where otherwise the right of action would have been barred by the statute of limitations.[4] Plaintiff allowed to insert additional words, but not a new cause of action.[5] Plaintiff allowed to insert a newly discovered cause of action.[6] Defendant permitted to add an additional justification.[7] Amendments, too, seem to be allowed with great liberality in the courts in England; thus another count was allowed to be added after a rule for a new trial.[8] On the trial the words

[1] Self *v.* Gardner, 15 Mo. 480.

[2] Wagaman *v.* Byers, 17 Md. 183. These following are adjudged material variances: If the declaration be for these words, "Thou *procuredst* eight or ten of thy neighbors to perjure themselves," and the jury find that he said, Thou *hast caused* eight or ten, &c, for it might be a remote cause, scilicit, without procurement. Nar. (the declaration), He *is* a bankrupt. Verdict, He will be a bankrupt within two days. Nar. He is a thief. Verdict, He stole a horse. Nar. Thou art a murderer. Verdict, He is, &c. Nar. *I know* him to be a thief. Verdict, *I think* him to be a thief. And at p. 330: Nar. Strong thief. Verdict, Thief. Nar. I say, &c. Verdict, I affirm or I doubt not. Nar. Plaintiff will do such a thing. Verdict, I think in my conscience he will do such a thing. (1 Trials per Pais, 329.)

[3] Code of Civ. Procedure, §§ 539, 540, 723. Leave to amend on the trial is discretionary. (Rosenwald *v.* Hammerstein, 12 Daly, 377.

[4] Tobias *v.* Harland, 1 Wend. 93. Leave to add a new count granted (Conroe *v.* Conroe, 47 Penn. St. Rep. 198), but denied after right of action had been barred by statute of limitations. (Smith *v.* Smith, 45 Penn. St. Rep, 403.) An amendment is as of the commencement of the action. (Horton *v.* Banner, 6 Ky. [Bush], 596.)

[5] Weston *v.* Worden, 19 Wend. 647. Plaintiff permitted on the trial to add a new cause of action. (Miles *v.* Van Horn, 17 Ind. 245.) Plaintiff not permitted to amend on trial by changing the action from libel to malicious prosecution. (Larkin *v.* Noonan, 19 Wis. 82.)

[6] Williams *v.* Cooper, 1 Hill, 637. Leave to add a justification refused. (Waters *v.* Guthrie, 2 Bailey, 106.)

[7] Graham *v.* Woodhull, 1 Caines R. 497. Defendant on trial allowed to strike out general issue and plead a justification. (Anon. 1 Hill [So. Car.], 251.)

[8] Wyatt *v.* Cocks, 10 Moore, 504 and see Clarke *v.* Allbut, 1 Gale, 358.

charged were allowed to be amended, the substance of the allegation remaining the same.[1] Plaintiff allowed to amend by alleging that the words were spoken of him in his character of auctioneer.[2] Leave to plead a justification, after verdict, denied.[3] Where the declaration alleged the publication of a libel *contained in and being an article in a certain weekly printed paper called The Paul Pry*, it was proved on the trial that the defendant gave to several persons to read a printed slip of paper containing the alleged libel, but it did not satisfactorily appear that such slip had been cut from The Paul Pry, the plaintiff was allowed to amend the record, without terms, by striking out the words in *italics*, and this course was approved by the court in banc.[4] Where the words charged were, "S. is to be tried at the Old Bailey for," &c., and the proof was, "I have heard that S. is to be tried at the Old Bailey for," &c., the plaintiff had leave to amend on payment of costs.[5] Where the words alleged were, "there have been many inquests held upon persons who have died *because* he attended them," and the proof was "Several have died that he (plaintiff) has attended, and inquests have been held on them," an amendment was allowed and approved in banc.[6] The court refused an amendment where it was of opinion that the words as proved did not impute an actionable charge,[7] and the court refused, on the trial, at the instance

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The statutes as to amendments to be liberally construed. (Smith *v.* Knowelden, 2 M. & Gr. 561.)

[1] Pater *v.* Barker, 3 C. B. 831; Foster *v.* Pointer, 9 Car. & P. 718; Saunders *v.* Bate, 1 Hurl. & N. 402; and see Lister *v.* McNeal, 12 Ind. 302.

[2] Ramsdale *v.* Greenacre, 1 Fost. & F. 61.

[3] Kirby *v.* Simpson, 3 Dowl. Pr. Cas. 791. Leave to add a plea of the statute of limitations refused. (Allensworth *v.* Coleman, 5 Dana, 315.) But granted. (Brickett *v.* Davis, 21 Pick. 404.) Where the defense was that the words complained against were parts of two *articles*, which *articles* were fair comments, on demurrer the court held the plea defective, but permitted the defendant to amend by substituting *words* for *articles*, so as to read which words were fair comments. (Morrow *v.* McGaver, 1 Ir. C. L. R. 579.)

[4] Foster *v.* Pointer, 9 C. & P. 718, 722.

[5] Smith *v.* Knowelden, 2 M. & Gr. 561.

[6] Southee *v.* Denny, 1 Ex. 196.

[7] Camfield *v.* Bird, 3 C. & K. 56. An amendment will not be allowed, if the effect of it be to afford reasonable

of the plaintiff, to strike out superfluous averments and innuendoes, which appeared to have been introduced to create a prejudice against the defendant,[1] and the application was not made until after the libel was read to the jury.

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ground for demurrer. (Martyn *v.* Williams, 1 Hurl. & N. 817; Caulfield *v.* Whitworth, 18 Law Times, N. S. 527.)

[1] Prudhomme *v.* Fraser, 1 M. & Rob. 435; see *ante*, §§ 280, 338. Amendment allowed (Pater *v.* Barker, 3 C. B. 831; and see Huckle *v.* Reynolds, 7 C. B. N. S. 114; Saunders *v.* Bate, 1 Hurl. & N. 402; Ramsdale *v.* Greenacre, 1 Fost. & F. 61.) Where the words alleged were "he was not sober," and the words proved were, he was "as drunk as a sow," and the latter words were relied on as evidence of malice, and as taking away the privilege of the occasion on which the words were spoken, the amendment was denied. (Sutton *v.* Plumridge, 16 Law Times, N. S. 741.) And where the words as laid in the declaration imputed a direct charge of felony, and the proof was that the words were to the effect that a *report* was in circulation that plaintiff had committed a felony, it was held to be a material variance, and leave to amend was refused. (Pearse *v.* Rogers, 2 Fost. & F. 137.)

CHAPTER XVI.

EVIDENCE FOR PLAINTIFF.

Proof of publication; of oral publication; of publication in writing; of its application to plaintiff; of defendant's liability—Opinion of witnesses as to meaning—Proof of inducement; of plaintiff's good reputation; of malice; to aggravate damages—Falsehood not evidence of malice—Other publications by defendant; subsequent publications; publication after commencement of action—Defendant's wealth—Defendant's ill-will to plaintiff—Ill-will to plaintiff of persons other than the defendant—The publication itself evidence of malice—Attempted justification an aggravation—Evidence in reply.

§ 373. If the publication is denied, a publication must be proved,[1] and the publication proved must be one for which the defendant is responsible.[2] On this subject much

[1] As to proof of the time of publication see *ante*, § 327.

[2] Where the general issue, as well as special pleas admitting the publication are pleaded, plaintiff is bound to prove the publication in the same manner as if there were no special plea. (Ricket *v.* Stanley, 6 Blackf. 169; Wheeler *v.* Robb, 1 Blackf. 330; Wright *v.* Linsay, 20 Ala. 428; Whitaker *v.* Freeman, 1 Dev. 271; Doss *v.* Jones, 5 How. [Miss.] 158; Cheadle *v.* Buel, 6 Ham. 67; Vassear *v.* Livingston, 13 N. Y. 256; Ayres *v.* Covill, 18 Barb. 264; Brooks *v.* Dutcher, 36 No. West. Rep. 128; *contra*, Jackson *v.* Stetson, 15 Mass. 48; Alderman *v.* French, 1 Pick. 1.) These last two decisions led to the passage of a statute in Massachusetts (act of 1826, ch. 107), by which it is enacted that in all actions for libel and slander wherein defendant may plead the general issue and a justification that the words written or spoken are true, the plea in justification shall not be taken as evidence that defendant wrote or spoke such words or made such charge, nor shall, in case defendant fail to establish it, be of itself proof of malice, but the jury shall decide upon the whole case, whether the plea was made with malicious intent. This statute, in Hix *v.* Drury (5 Pick. 303), was called "a great departure from the common law of England and of this (Massachusetts) Commonwealth." The fact is that the case of Jackson *v.* Stetson is opposed to all principle and precedent. (See a note to that case in the edition of Massachusetts Reports, with notes by Benjamin Rand,

has already been said in a previous chapter (Ch. VI). Whether there has been any publication by the defendant is a question of fact for the jury, but what amounts to a publication for which the defendant is responsible as publisher is a question of law for the court.[1] If the facts were, that the defendant had posted up a libel in a public place, but had taken it down again before any one had read it, there would in point of law be no publication, but if it were doubtful whether before it was taken down some one had not read it, that would be a question of fact for the jury.[2]

§ 374. The post-mark on a letter has been held *prima facie* evidence of the publication of the letter.[3] The production by the plaintiff on the trial of a letter addressed to a third person, held evidence of the publication of the

Boston, A. D. 1858; see note § 400, *post*.) If a newspaper publisher, on request, refuses to give up the name of the author of an alleged libel published in his paper, he takes the place of such author, and is not entitled to any privilege or excuse founded on sympathy for the publisher. (Hibbins *v.* Lee, 11 Law Times, N. S. 541; 4 Fost. & F. 243.)

[1] A committee appointed by a society to investigate certain bills, presented by plaintiff, without special authority made a special report in print. Copies were freely taken from the secretary's desks, and the report subsequently adopted by the society. Held, that there was no evidence of publication by the society. (De Linancour *v.* Société Prévoyance, 16 No. East. Rep. 555 [Mass.].) As to proof of liability as publisher under 6 & 7 Vict. c. 96, see Reg. *v.* Holbrook, 39 Law Times Rep. 556.

[2] Stark. Ev. tit. Law and Fact; see Prescott *v.* Tousey, 50 N. Y. Superior Co't, 12; and *ante*, § 108. Where an alleged libel is placed where it *might* be seen and read, it is unnecessary to prove it *was* seen and read. (Giles *v.* The State, 6 Ga. 276.) In those States in which a party may be witness in his own behalf, the plaintiff may prove the speaking by the defendant of the words complained against, although other persons than plaintiff and defendant were present at the time. (Hess *v.* Fockler, 25 Iowa, 9.) Defendant's admission that she *supposed* she had repeated the story, equivalent to an admission of publication. (Burt *v.* McBain, 29 Mich. 260; see Kine *v.* Sewell, 3 M. & W. 297.) Plaintiff cannot prove the publication by showing that defendant as a witness in another case had admitted speaking the words complained of. (Osborne *v.* Forshee, Sup. to 2 Mich. N. P. Rep. 43; see The State *v.* Riggs, 39 Conn. 498; see *post*, note to § 381.) Where the only witness to prove an oral publication was a German, the court refused to disturb a verdict for the plaintiff on the ground that it was not shown but that the words were spoken in English, which language the witness did not understand. (Hurtert *v.* Weines, 27 Iowa, 134.)

[3] Shipley *v.* Todhunter, 7 C. & P. 680; Hitchon *v.* Best, 1 B. & B. 299; Rex *v.* Watson, 1 Camp. 215; Rex *v.*

letter, without the oath of the person to whom the letter is addressed.[1] Where the letter produced was addressed to a person in Scotland, with the seal broken and a post-mark of a place in England, where it was proved to have been received and forwarded, held *prima facie* evidence that the letter was received by the party to whom it was addressed, and of its publication.[2] Where the defamatory matter was contained in a letter addressed by the defendant to the plaintiff, and there was no evidence of its publication, other than the production of the letter by the plaintiff, it was held not sufficient;[3] but where, in addition, it was shown that the letter was in the handwriting of the defendant, and that he had read it aloud in the presence of several persons, it was held that the letter might be read to the jury.[4] The defendant had been chairman of a public meeting, at which the libel in question had been signed by him, and ordered by the meeting to be published; on a demurrer to evidence, an affidavit of the defendant, and one of A., which the defendant in his own affidavit referred to as correct, stating that the address was ordered to be published, and admitting and justifying the publication, together with a copy of the address annexed to the affidavits, and referred to in them, were held sufficient evidence of publication.[5]

§ 375. Where a witness who heard the words spoken immediately committed them to writing, he may, on

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Johnson, 7 East, 65; Fletcher *v.* Braddyll, 3 Stark. Cas. 64; Rex *v.* Williams, 2 Camp. 506; Rex *v.* Girdwood, East P. C. 1116.

[1] Callan *v.* Gaylord, 3 Watts, 321. A post-mark does not prove itself; how proved see Abbey *v.* Lill, 5 Bing. 299; Woodcock *v.* Houldsworth, 16 M. & W. 124.

[2] Warren *v.* Warren, 1 Cr. M. & R. 250; 4 Tyrw. 850; Stocken *v.* Collin, 7 M. & W. 515; see Mills *v.* The State, 18 Neb. 575.

[3] McIntosh *v.* Matherly, 9 B. Monr. 119.

[4] McCoombs *v.* Tuttle, 5 Blackf. 431; see note 2, p. 87, *ante*. Evidence of the reading the libel in a public place, and of comments upon it in defendant's hearing, and that it was put up on handbills by persons unknown, was permitted to be proved. (Rice *v.* Withers, 9 Wend. 138.)

[5] Lewis *v.* Few, 5 Johns. 1.

swearing that he wrote down the exact words, read what he wrote in evidence. If the words were not written down until some time after the witness heard them, although he may not read his memorandum in evidence, he may, to refresh his memory, refer to his original memorandum,[1] but not to a copy of it.[2] In actions of slander, witnesses cannot be allowed to state the impression the words used made upon their minds, but they must state positively, or as near as memory will allow, the exact words.[3]

§ 375 *a*. We have already more than once called attention to the fact that the plaintiff must show the language published and of which he complains was "concerning him." (§ 131.) He has to show or allege this in his pleading (§ 316), and in all cases it is a question of fact for the jury (§ 286) upon the trial. Where the plaintiff is mentioned by name, that fact alone furnishes a presumption that he is the person intended.[4] But where the name of the plaintiff is not stated, or where a portion only of his name is stated, then if the application of the matter to the plaintiff is denied, the burden is upon him to show its application. To do this he must prove facts which show such application; he cannot prove the application directly, by asking a witness who has read the publication whom he understood to be intended.[5] Thus, where the publication was on its face concerning one Leo, upon the trial witnesses, against the objection of the defendant, were allowed to testify that upon reading the article they recognized its

[1] Sandwell *v.* Sandwell, Holt R. 295; Huff *v.* Bennett, 6 N. Y. 337.

[2] Burton *v.* Plummer, 2 Adol. & El. 343.

[3] Teague *v.* Williams, 7 Ala. 844; Alley *v.* Neely, 5 Blackf. 200; Rainy *v.* Bravo, L. R. 4 P. C. 287; *contra*, Hawks *v.* Patton, 18 Ga. 52. Where, in an action for slander, it is important to show that the charge proved by a witness for the plaintiff had reference to a trial, it is not indispensable for the witness to give the exact words of defendant showing such reference; but if this is desired, they should be elicited on cross-examination. (Douge *v.* Pearce, 13 Ala. 127.) Where, in slander, there is a question as to the exact words used, and the case is left to the court, its decision will not be reviewed. (Hahn *v.* Hull, 3 Cent. Rep. 726 [Ct. of App. Md.].)

[4] Note to § 131, *ante;* The People *v.* Snyder, 41 N. Y. 403.

[5] Note to § 131, *ante.*

application to the prosecutor; this was held error.[1] It is not permissible to show defendant slandered others, as proof he slandered plaintiff.[2]

§ 376. In an action of libel against the proprietor of a newspaper, a copy of the paper bought at the office of such proprietor, the paper alleging on its face that the defendant is the proprietor, sufficiently connects the defendant with the paper, and a paragraph in it may be read to the jury to show the circulation of the paper.[3] On a declaration in slander, consisting of a single count, in which the slanderous words were alleged to have been uttered by the defendant "on the 1st day of November, 1856, and on divers other days and times before the purchase of the plaintiff's writ," it was held, that the plaintiff might, in support of his action, prove a single uttering of the slander by the defendant on any day prior to the date of the writ.[4] A declaration alleged that the defendants published, or caused to be published, in a certain pamphlet, a libel concerning the plaintiff. From the evidence, it appeared that the defendants were instrumental in procuring the vote of a medical society expelling the plaintiff therefrom for gross immorality. The vote was published among the transactions of the society, by the regular committee of publication, of which the defendants were not members. Held, that the allegation in the declaration was not supported.[5] That one had heard of a slanderous report with regard to the plaintiff, is evidence to prove the circulation of the

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[1] The People *v.* Parr, 25 Week. Dig. 113.

[2] Sullivan *v.* O'Leary, 146 Mass. 322.

[3] Fry *v.* Bennett, 4 Duer, 247; see The State *v.* Jeandell, 5 Harring. 475, and Reg. *v.* Stranger, Law Rep. 6 Q. B. 352.

[4] Rice *v.* Cottrel, 5 R. I. 340; Norris *v.* Elliott, 39 Cal. 72; and as to proving time of publication, see Richardson *v.* Roberts, 23 Ga. 215; Wright *v.* Britton, 1 Morris, 286; Quigley *v.* McGee, 12 Oregon, 22; and § 109, *ante*. In criminal prosecutions the time is material. (Stichtd *v.* The State, 8 So. West. Rep. 477.)

[5] Barrows *v.* Carpenter, 11 Cush. 456.

report, but not to prove that the defendant circulated the report.[1]

Where a declaration for publishing a libel does not purport to set it forth in *hæc verba*, and a libel corresponding with the declaration is produced on the trial, if the jury believe that the defendant published any part of the libelous matter, they must find for the plaintiff.[2] It is calculated to mislead the jury to refer it to them to determine whether the defendant "in substance" spoke or published the words charged, without explaining the meaning that the law would attach to that expression in connection with the proof of the slander charged.[3]

§ 377. The words of a defamatory writing cannot be proved by parol, unless it has been shown that the writing itself cannot be produced.[4] If the original libel is lost or destroyed or out of the jurisdiction of the court, or if after the publication the defendant obtains possession of the writing and refuses to produce it, in those cases secondary evidence of its contents may be given.[5] Where, to prove the defendant the *author* of a libel which the defendant had notice to produce, A. was called, who swore he re-

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[1] Schwartz *v.* Thomas, 2 Wash. 167.

[2] Metcalf *v.* Williams, 3 Litt. 387.

[3] Attebury *v.* Powell, 29 Mo. (8 Jones), 429.

[4] Simpson *v.* Wiley, 4 Porter, 215; Aspenwall *v.* Whitemore, 1 Root, 408; and see McGrath *v.* Cox, 3 Up. Can. Q. B. Rep. 332. The alleged libel must be read to the jury, and where the whole of the alleged libel is not set forth in the complaint, defendant has the right to have the whole read. (Cooke *v.* Hughes, 1 Ry. & M. 112.) And where the publication was in a newspaper, held that defendant might insist on having other parts of the same newspaper read as part of plaintiff's case. (Thornton *v.* Stephen, 2 M. & Rob. 45; Rex *v.* Lambert, 2 Camp. 398.) And jury may consider the whole publication for the purpose of forming an opinion as to the meaning of the alleged libel. (Goodrich *v.* Davis, 11 Metc. 473; and see Rex *v.* Bear, Salk. 417; Rex *v.* Dean of St. Asaph, 3 T. R. 428, note; Perry *v.* Breed, 117 Mass. 155.)

[5] Winter *v.* Donovan, 8 Gill, 370; Att'y Gen. *v.* Merchant, 2 T. R. 201; Layer's Case, 6 State Tr. 229; Rainy *v.* Bravo, L. R. 4 P. C. 287; Gathercole *v.* Miall, 15 M. & W. 319; Behee *v.* Pac. R. R. Co. 9 So. West. Rep. 450; Boyle *v.* Wiseman, 10 Ex. 647; Newton *v.* Chaplin, 10 C. B. 56; R. *v.* Llanfaethly, 2 Ell. & B. 940; R. *v.* Aickles, 1 Leach, 330; see § 378, *post*. Proof a libel written on a wall. (Mortimer *v.* McCallan, 6 M. & W. 67.) Or of a placard. (Bruce *v.* Nicolopulo, 11 Ex. 133.)

ceived the manuscript of the libel from the defendant and returned it to him, but on cross-examination the witness stated that he had not delivered the manuscript to the defendant himself, but had delivered it to his (the witness') own servant to deliver to the defendant. A.'s servant was called, who testified that he delivered the manuscript to the defendant's servant; held, not sufficient to enable the prosecutor to give parol evidence of the existence of the paper, nor for considering the defendant as the *author* of the libel.[1]

§ 377 *a*. There are instances of the courts having refused to compel the production of the writing, and at the same time have excluded secondary evidence of its contents; as, where the communication was addressed to the governor of a State respecting a State officer, the court held that the governor to whom it was addressed might exercise his own discretion as to its production, and excluded parol evidence of its contents.[2]

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[1] Rex *v.* Pearce, Peake's Cases, 75. There is a presumption that one to whom a message has been intrusted for delivery has delivered it. (Middleton *v.* Barned, 4 Ex. 241; Wells *v.* Webber, 2 Fost. & F. 715.)

[2] Gray *v.* Pentland, 2 S. & R. 23; 4 S. & R. 420; and see Wyatt *v.* Gore, Holt's Cases, 299; Oliver *v.* Bentinck, 3 Taunt. 456; Howard *v.* Thompson, 21 Wend. 319; Beatson *v.* Skene, 5 Hurl. & N. 838; M'Elveney *v.* Conellan, 17 Ir. Com. L. R. 55; Earl *v.* Vass, Boyd Kinnear's Dig. H. L. Cas. 226; 1 Shaw's App. Cas. 229; Home *v.* Bentinck, 2 Brod. & B. 130; Dawkins *v.* Rokeby, Law Rep. 8 Q. B. 255; 45 L. J. Q. B. 8; Cooke *v.* Maxwell, 2 Stark. R. 183; Anderson *v.* Hamilton, 2 Brod. & B. 156; Mosbury *v.* Madison, 1 Cranch, 144; Yoter *v.* Lanno, 6 Watts, 156; and see 1 Burr's Trial, 186; Hennessy *v.* Wright, 21 Q. B. D. 509; Thompson *v.* German Valley R. R. Co. 22 N. J. Eq. 111; 17 Alb. L. J. 78. In an action for libel, pending in the Circuit Court of the District of Columbia, the Hon. Edwin M. Stanton, Secretary of War, was summoned as a witness to produce an original letter addressed to the former assistant secretary of war, Dana, which letter contained the matter alleged to be libelous. Mr. Stanton put in an affidavit respectfully submitting his objections to the production of the paper in question, and asking to be discharged from further attendance. The affidavit bore the following indorsement: "Sir, Letters on file with the heads of departments are privileged communications. Unless their publication has been authorized, no copies should be taken at private request, and the production of the original cannot be compelled in a suit between individuals. It has been ruled that such communications cannot be made the foundation of an action for libel. Then I think the head of a department is bound not to produce a paper on file in his office. Such a letter as you describe is a privileged communicatton. (Signed.) J. Speed, Attorney General." And in an action for libel, it was held that a

§ 378. Where the defamatory writing has been lost, secondary evidence of its contents may be given.[1] (§ 377.) Where the libel (a song) from which the publication took place was lost, a printer was allowed to produce a similar one printed at the same time, and which he proved corresponded with the one lost.[2] Where to sustain an action of libel, the proof sought to be made was, that the publication was by an affidavit, made by the defendant before a magistrate, imputing to the plaintiff the offense of hog stealing, and the only evidence of the existence of the affidavit was an imperfect memorandum of it, in the handwriting of the magistrate, who was alive and out of the State, and there was no sufficient proof of its being, in whole or in part, a copy; it was held that the evidence was not sufficient to sustain the action.[3]

§ 379. In an action against the proprietor of a newspaper for a libel contained in it, proof that the paper came from the defendant's office, and was one copy of an edition

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member of Parliament could not be examined as to what was said by the plaintiff in the course of a debate in Parliament. (Plunkett *v.* Cobbett, 5 Esp. 136.) The plaintiff having failed in his application to the Senate for the removal of the injunction of secrecy, the testimony of a Senator was admitted to prove that plaintiff's nomination had been rejected by the Senate. (Law *v.* Scott, 5 Har. & J. 438.) It has been held to be optional on the part of counsel whether he will disclose what passed in court on his making a motion. (Curry *v.* Walter, 1 Esp. 456.) Lord Abinger was called as a witness to testify as to what he had said as counsel. (Stockdale *v.* Tarte, 4 Adol. & El. 1016.) And held that a letter to the chief secretary of the postmaster general is not privileged from disclosure in court on the ground that it is an official communication to a public officer. (Blake *v.* Pilfold, 1 Moo. & Rob. 198; see Black *v.* Holmes, 1 Fox & Sm. 28; Perkins *v.* Crummer, 1 Law Rec. O. S. 36; Croke *v.* O'Grady, 4 *Id.* 42, 49; see *ante*, p. 313, and note; and § 397.)

[1] Gates *v.* Bowker, 18 Vt. (3 Washb.) 23; Strader *v.* Snyder, 67 Ill. 404; Weir *v.* Hoss, 6 Ala. 881; Gathercole *v.* Miall, 15 M. & W. 319; Fryer *v.* Gathercole, 4 Ex. Rep. 262; Behee *v.* Mo. Pac. R. R. 9 So. West. Rep. 449. Where it appeared that the alleged libel was filed of record in the navy department at Washington, held that secondary evidence of its contents might be given. (Carpenter *v.* Bailey, 56 N. H. 283.) Evidence of a libel by chalk mark on a wall. (Mortimer *v.* McCallan, 6 M. & W. 58; Stall *v.* Massey, 2 Stark. 559.) Inscriptions on banners. (Rex *v.* Hunt, 3 B. & Ald. 566; and Bruce *v.* Nicolopulo, 11 Ex. 133.)

[2] Johnson *v.* Hudson, 7 Ad. & Ell. 233, note.

[3] Sanders *v.* Rollinson, 2 Strobh. 447.

of the same date, and alleging on its face that he is the proprietor, is proof of a publication by him;[1] and so in such an action, testimony by a subscriber for the paper, upon being shown the number of the paper containing the article in question, that it was in all respects similar to the paper left at his office, and that he had read the article contained in the paper produced in the one left at his office, is sufficient proof of publication, without producing the paper left at his office.[2] And where a witness swore that he was a printer, and had been in the office of the defendant when a certain paper was printed, and he saw it printed there, and the paper produced by the plaintiff was, he believed, printed with the types used in the defendant's office; held that this was *prima facie* evidence of the publication by the defendant.[3] The witness in this case might have refused to testify on the ground that he inculpated himself,[4] but as he did not claim his privilege, his testi-

[1] The State *v.* Jeandell, 5 Harring. 475; Fry *v.* Bennett, 4 Duer, 247; Com'wealth *v.* Morgan, 107 Mass. 199. An affidavit which stated that a copy of a newspaper had been purchased from a salesman in the office of said newspaper, and that on the face of said paper it was stated that J. S. was the printer and publisher thereof, and that deponent believed J. S. to be the printer and publisher, held not to contain legal evidence of J. S. being the publisher. (Reg. *v.* Stanger, L. R. 6 Q. B. 352.) Evidence admitted of a copy of a newspaper bought at a news stand. (Com. *v.* Morgan, 107 Mass. 199.)

[2] Huff *v.* Bennett, 4 Sandf. 120; and see Commonwealth *v.* Blanding, 3 Pick. 304.

[3] Southwick *v.* Stevens, 10 Johns. 442; McCorkle *v.* Binns, 5 Binney (Pa.), 340; *post*, § 381.

[4] Moloney *v.* Bartley, 3 Camp. 210; *ante*, § 270. Where a defendant is subpœnaed as witness for the plaintiff, he cannot object to being sworn, on the ground that any relevant questions put to him would tend to criminate himself. Plaintiff has a right to have him sworn, and defendant must answer the questions put to him, or object, as any other witness, to any question that would criminate him. (Boyle *v.* Wiseman, 10 Ex. 647.) As to interrogatory to defendant inquiring if he wrote the alleged libel, see Inman *v.* Jenkins (Law Rep. 5 C. P. 738). Interrogatories to defendant not allowed merely to rebut privilege by showing malice (Davis *v.* Gray, 30 Law Times, N. S. 418); nor to enable plaintiff to institute criminal proceedings (*Id.*; and see Stein *v.* Tabor, 31 *Id.* 444); nor to prove truth of criminal matter charged (Thorpe *v.* Macauley, 5 Madd. 218, 229); nor to compel an answer which defendant swears would criminate him (Bowden *v.* Allen, 22 Law Times, N. S. 342); nor to prove contents of a communication to Lords Commissioners of the Great Seal (Fitzgibbon *v.* Greer, Ir. Rep. 9 Com. Law, 294); nor, before the statute 6 & 7 Vict. ch. 76, to show defendant the publisher (Baker *v.* Pritchard, 2 Atk. 387; Selby *v.* Crew, 2 Anst. 504); but allowed where the alleged libel

mony was properly received; and so it was held in the case of a witness who had written the defamatory matter at the request of the defendant.[1]

§ 380. Proof that the defendant gave a bond to the stamp office for the duties on the advertisements in a newspaper, under the statute 29 George III, ch. 50, and

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would not authorize a criminal proceeding. Can there be such a case? (*Ante*, § 9; M'Loughlin *v.* Dwyer, Ir. Rep. 9 Com. Law, 170.) Interrogatories allowed to prove plea of justification. (Macauley *v.* Shackell, 1 Bligh, N. S. 96, 133; Collins *v.* Yates, 27 Law Jour. Ex. 150.) In Ramsden *v.* Brearley (33 Law Times, N. S. 322), an interrogatory was allowed, "Were you the printer and publisher of the newspaper?" This was under the statute 6 & 7 Vict. ch. 76, providing that discovery is not to be used in any other proceeding. In Wilton *v.* Brignell (Addenda to Hare on Discovery, 2d edit.), from the following interrogatories the words in *italics* were struck out: Was the passage set out in paragraph 3 intended by defendant to apply to plaintiff; *if not, say to whom? Were you yourself the writer of the passages (citing them); if not, who was?* (See *ante*, notes to § 270) Interrogatories to defendant of a fishing character not allowed. (Stiern *v.* Sevastopulo, 8 Law Times, N. S. 538.) A party should not be compelled to disclose facts to enable plaintiff to sustain an action for slander. (Bailey *v.* Dean, 5 Barb. 297.) It is now the settled practice in New York, that in an action for libel defendant cannot, either on examination before trial or upon the trial, be asked any question which will prove or tend to prove him the publisher of the alleged libel. (Phœnix *v.* Dupey, 2 Abb. N. C. 146; Atherley *v.* Harvey, 25 Week. Rep. 727; Corbett *v.* De Cormeau, 45 N. Y. Superior Co't, 637; 4 Abb. N. C. 252; 5 *Id.* 169; and see Lamb *v.* Munster, 8 Q. B. D. 110.) It may be otherwise in an action for slander, as there is no criminal prosecution for that offense. In an English case to prove defendant the writer of the libel, he was shown a letter addressed to a third person and asked whether or not he was the writer of that letter. Although defendant objected the answer might tend to criminate him he was required to answer. (Jones *v.* Richards, 15 Q. B. D. 439.) Where the libel was that plaintiff had fabricated a story to the effect that a certain circular letter purporting to be signed by defendant had been sent around to defendant's competitors in business. Defense, truth. Plaintiff having as alleged stated he had seen copies of the alleged letter, that two of such copies were in existence in the possession of persons described but not named, and that his informant was a solicitor. In interrogatories administered by defendant, plaintiff was asked to state the name and address of his informant, and the names and addresses of the persons to whom the letter had been sent, and in whose possession the two letters existed; he refused to answer on the ground that he intended to call those persons as his witnesses at the trial. Held, that defendant was entitled to an answer. (Marrot *v.* Chamberlain, 18 Q. B. D. 154; and see Webb *v.* East, 5 Ex. Div. 108, where a defendant was called upon to produce a copy of the alleged libel.) Where a bill of particulars of a general plea of justification on the ground of truth had been ordered, the court refused to allow interrogatories to plaintiff to enable defendant to comply with the order, without an affidavit disclosing circumstances to warrant a departure from the general rule. (Gourley *v.* Plimsoll, Law Rep. 8 C. P. 362.)

[1] Schenck *v.* Schenck, Spencer (2 N. J. L. R.), 208.

that he had occasionally applied at the stamp office respecting the duties, was held to be sufficient evidence of his being the publisher of such newspaper.[1] And the production of a certified copy of the affidavit required by the statute 38 George III, ch. 78, with a newspaper containing the libel, corresponding with the paper described in the affidavit; held to be sufficient evidence of publication by the defendant.[2] Where, in an action for libel in a newspaper, the one put in had the place of publication "at the corner of Charles street and Hadfield street, in the parish of M.," the certificate of the stamp office declaration was at "No. 23 Charles street," in the parish, &c.; held sufficiently to identify the newspaper as published by the declarant, within the 6th & 7th William IV, ch. 76.[3]

§ 381. The publication of a libel in a newspaper may be proved by producing the copy of the newspaper filed in the office of the commissioner of stamps,[4] or by producing a copy filed in the office of publication of such newspaper.[5] On the trial of an action for a libel in a newspaper, a witness stated that he was president of a literary institution having eighty members; that about the date of the paper proved, one was brought (he could not

[1] Rex *v.* Topham, 4 T. R. 126. Distributing newspapers containing defamatory matter and receiving pay for them through an agent is sufficient evidence of publication by defendant. (The State *v.* Davis, 3 Yeates, 128.) Defendant proved to be owner in 1848 and 1849, it was presumed he continued the owner in 1851. (Fry *v.* Bennett, 28 N. Y. 330.)

[2] Mayne *v.* Fletcher, 9 B. & Cr. 382; Rex *v.* Hunt, 9 B. & Cr. 385, n.; Rex *v.* Hart, 10 East, 94.

[3] Baker *v.* Wilkinson, 1 Carr. & M. 399; Rex *v.* Donnison, 4 B. & Ad. 698. The statute 6 & 7 William IV, ch. 76, has since been repealed, 32 & 33 Vict. ch. 24, and now there is no statutory proof of publication. (Reg. *v.* Stanger, Law Rep. 6 Q. B. 352.)

[4] Cook *v.* Ward, 6 Bing. 409.

[5] Rex *v.* Pearce, Peake's Cas. 75. A witness may testify to the contents of a paper not produced, it being a printed one, always issued in the same form. (Butler *v.* Maples, 9 Wall. 766.) To prove the publication in a newspaper, it is not necessary to produce a copy actually published; it is sufficient to produce a copy, and prove that papers of the same kind were published. (Simmons *v.* Holster, 13 Min. 249; see Rex *v.* Watson, 2 Stark. 129; Johnson *v.* Hudson, 7 Adol. & El. 233 n.; and note to § 382, *post.*) Against a person not connected with the paper, mere proof of the periodical publication of the paper not sufficient. (Simmons *v.* Holster, 13 Minn. 249; *ante*, § 379.)

say by whom) to the reading-room of the institution, and left there gratuitously; that, a fortnight after, it was taken away without his authority, and never returned; that he had searched for it and could not find it, and believed it to be lost or destroyed; that the title of it was the same as that proved, and, as far as he could judge from a glance at it, such paper contained the libel in question, and he believed it was a copy of that paper. He was not cross-examined. Held, first, that secondary evidence of the contents of the copy was properly admitted; secondly, that there was evidence for the jury that the paper so sent to the institution was a copy of that which contained the libel; thirdly, that, though sent by a person unknown, it was evidence against the defendant, not to show malice, but to affect the damages, by showing the extent of circulation.[1] But where a defendant alleged, in mitigation, that a libelous book was published against him by plaintiff, and in support of such allegation, a bookseller produced, from his own possession, a printed book, stating his belief that it is one of a number of copies published at his shop; held that this was not evidence for the jury that another book with the same contents was actually published.[2]

§ 382. Where a person has admitted that he was the author of a libel in a certain newspaper, any other newspaper of the same impression may be read to the jury, and is not secondary evidence.[3] A newspaper may be read in evidence although not stamped.[4] To prove the publication of a libelous pamphlet, a witness testified that she received from the defendant a copy of a pamphlet, of which she

[1] Gathercole *v.* Miall, 15 M. & W. 319; 15 Law Jour. Rep. 179, Ex.; 10 Juris, 337; 7 Law Times, 89.

[2] Watts *v.* Fraser, 7 Ad. & E. 223; 1 Mo. & Rob. 449; Moore *v.* Oastler, 1 Mo. & Rob. 451, n.

[3] McLaughlin *v.* Russell, 17 Ohio, 475; Woodburn *v.* Miller, Cheves, 194. Admission of authorship of a libel not equivalent to an admission of publication. (De Lettre *v.* Kilner, 3 Menzies, 12; Case of The Seven Bishops, 4 St. Trials, 300; see *ante*, note to §§ 373, 381.)

[4] Rex *v.* Pearce, Peake's Cas. 75: 1 Esp. 456.

read some portions, and lent it to several persons in succession, who returned it to her, and although there was no mark by which she could identify it, she believed the copy produced to be the same, but could not swear that it was; held that this was evidence of publication proper to be left to the jury.[1] Where several copies of a placard are printed, and a party adopts and uses some of the copies, all the rest are duplicate originals, and one of them may be read against such party, without notice to produce.[2] But placards in the windows of third persons, setting forth the forthcoming contents of the newspaper in which the libel was contained—held inadmissible against the author, unless he were connected with the publication of them.[3] If the manuscript of a libel be proved to be in the handwriting of the defendant, and the libel be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publication were by his direction.[4] And as handwritings may be compared, in an action for libel, if the testimony is corroborated from other sources,[5] papers in the handwriting of the defendant, found in the house of the editor of the newspaper in which the libel was published, were held admissible to prove the publication by the defendant.[6]

§ 383. The defendant's liability as publisher may be

[1] Fryer *v.* Gathercole, 18 Law Jour. Ex. 389; 13 Jurist, 542; 13 Law Times, 285.

[2] Rex *v.* Watson, 2 T. R. 199; see Reg. *v.* Boucher, 1 Fost. & F. 486.

[3] Raikes *v.* Richards, 2 Car. & P. 562.

[4] Reg. *v.* Lovett, 9 Car. & P. 462.

[5] Callan *v.* Gaylord, 3 Watts, 321; Waddington *v.* Cousins, 7 Car. & P. 595; see Rex *v.* Cator, 4 Esp. 117; Case of the Seven Bishops, 4 State Tr. 338.

[6] Tarpley *v.* Blabey, 2 Bing. N. C. 437; 2 Sc. 642; 7 Car. & P. 395; May *v.* Brown, 3 B. & Cr. 113; Finnerty *v.* Tipper, 2 Camp. 72; Wakley *v.* Johnson, 1 Ry. & M. 422; Stark. Sland. 3 ed. 429. In an action for services in preparing reports for a newspaper, the authorship being in question, it is not competent to ask the opinion of a witness (founded merely on his having read the articles and professing a knowledge of the plaintiff's style of writing) as to whether the reports were written by plaintiff. (Lee *v.* Bennett, How. Ct. of App. Cas. 202.)

proved by showing a copy of the alleged libel in the defendant's handwriting,[1] addressed to the editor of a newspaper;[2] or by showing that defendant paid the printer or publisher of a newspaper for the insertion of the defamatory matter in the newspaper of such printer or publisher;[3] or by showing the defendant's admission of authorship.[4] Where the defendant admitted that he was the author of the alleged libel, *errors excepted*, held that the burden was on him to show that the errors were material.[5] The fact that the defendant made the publication to the witness under an injunction of secrecy is no objection to the proof of the publication by such witness.[6]

§ 384. The court and jury, and not the witnesses, are to construe the words.[7] And the opinion of witnesses as

[1] McCoombs *v.* Tuttle, 5 Blackf. 431.

[2] Bond *v.* Douglas, 7 C. & P. 626; and see Burdett *v.* Abbot, 5 Dow. 201.

[3] Schenck, *v.* Schenck, Spencer (2 N. J. L. R.), 208.

[4] Commonwealth *v.* Guild, Thatcher's Crim. Cas. 329; Rex *v.* Burdett, 4 B. & A. 314; The Seven Bishops' Case, 4 State Trials, 304. Evidence of a threat to publish a libel is sufficient *prima facie*, when unexplained, to charge defendant with publication. (Bent. *v.* Mink, 46 Iowa, 576.) Admission of being publisher, although made in a conversation relating to a compromise, is admissible in evidence, if not made for the purpose of a compromise. (Binford *v.* Yound, 16 No. East. Rep. 142 [Ind.]; and see Page *v.* Merwin, 54 Conn. 426; Resp. *v.* Davis, 3 Yeates, 128; Cruikshank *v.* Gordon, 48 Hun, 308.) Where the letter containing the defamatory matter was sent sealed, and the writer afterwards stated, in the presence of several persons, that he had got W. to write the letter for him, and he had signed his own name to it, and kept a copy, and stated the contents of the letter, but without producing it, or a copy of it; *held*, that this was a publication of the libel. (Adams *v.* Lawson, 17 Gratt. [Va.] 250.)

[5] Rex *v.* Hall, 1 Str. 416.

[6] McGowan *v.* Manifee, 7 T. B. Monr. 314. A witness who admits that he knows who is the author of a libel is bound to disclose his knowledge. (The People *v.* Fancher, 4 Sup. Ct. Rep. [T. & C.] 467.)

[7] Olmstead *v.* Miller, 1 Wend. 510. Where the imputation was that the plaintiff was a truck-master—held that the term being composed of common English words, no evidence was necessary to explain its meaning, and that it was for the jury to say whether under all the circumstances the word was used in a defamatory sense. (Homer *v.* Taunton, 5 Hurl. & N. 661; Gribble *v.* Pioneer Press Co. 34 Minn. 342.) Where the words were: "It is wondered at how he can live in more than ordinary style, as he does, while having merely the honorable receipts of his agency to live on." Left to jury to say if they amounted to a charge of embezzlement. (Edwards *v.* Chandler, 14 Mich. 471.) In Weed *v* Bibbins (32 Barb. 315), held that evidence of what was generally understood by "the Cunningham affair" was improperly admitted. (And see Justice *v.* Kirlin, 17 Ind. 588; Wachter *v.* Quenzer, 29 N. Y. 552; Dedway *v.* Powell, 4 Ky. [Bush], 77; and *ante*

to the meaning of the language published is not admissible,[1] and, therefore, a witness cannot be asked how he under-

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Ch. VII, and §§ 281, 286.) If the words are of doubtful signification, it is for the jury to determine in what sense they were used. (Goodrich *v.* Wolcott, 3 Cow. 231; Demarest *v.* Haring, 6 Cow. 76; Gibson *v.* Williams, 4 Wend. 320; *Ex parte* Baily, 2 Cow. 479; Rundell *v.* Butler, 7 Barb. 260.) A witness cannot be asked nor permitted to state how he understood the language (Van Vechten *v.* Hopkins, 5 Johns. 211; Maynard *v.* Beardsley, 7 Wend. 560; affi'g 4 Wend. 336; Gibson *v.* Williams, 4 Wend. 320; White *v.* Sayward, 33 Maine, 322; Snell *v.* Snow, 13 Metc. 278), except where the language is not actionable on its face, and is made actionable by a colloquium, as where the charge is made in a cant phrase, or phrase of local meaning, or a nickname. (Sasser *v.* Rouse, 13 Ired. Eq. 142; and see De Armond *v.* Armstrong, 37 Ind. 35.) Where the alleged libel was in German, and contained a phrase "the Swiss gallows," which did not show on its face what was meant, and no one, without a knowledge of the popular understanding of the phrase could attach any particular meaning to the words.—held it was competent for plaintiff to prove that the phrase had a commonly understood meaning among Germans, and what was that meaning. (Wachter *v.* Quenzer, 29 N. Y. 547; see Blakeman *v.* Blakeman, 31 Minn. 396; Leonard *v.* Allen, 11 Cush. 241; Fawcett *v.* Clarke, 48 Md. 494; Knapp *v.* Fuller, 55 Vt. 311.) Held witness could not testify to meaning of the term shyster. (Gribble *v.* Pioneer Press Co. 36 Alb. L. J. 325.) If the application and meaning of the words are ambiguous, or the sense in which they were used is uncertain, and they are capable of a construction which would make them actionable, although at the same time an innocent sense can be attributed to them, it is for the jury to determine, under all the circumstances, whether they were applied to the plaintiff, and in what sense they were used. (Sanderson *v.* Caldwell, 45 N. Y. 401; Royce *v.* Maloney, 58 Vt. 437; see Elsworthy *v.* Hayes, 37 No. West. Rep. 249, citing Geary *v.* Bennett, 53 Wis. 444; Weil *v.* Schmidt, 28 Wis. 137; Campbell *v.* Campbell, 54 Wis. 90; Rowand *v.* De Camp, 96 Pa. St. 493; Singer *v.* Bender, 64 Wis. 169.) Plaintiff cannot aid his innuendoes by testimony of witnesses. If you could aid the innuendo by the opinion of a witness "there would be no use for an innuendo; its office would be supplied by the oath of the witness," who, instead of the jury, "would draw the inference from the precedent facts." (Thompson, J., Rangler *v.* Hummell, 37 Penn. St. 130; 1 Wright, 130; Pittsburg R'road *v.* McCurdy, 6 Cent. Rep. 719.) It does not necessarily impute unchastity to charge a married woman with having a venereal disease. Whether it was intended to charge her with unchastity is a question for the jury. (Upton *v.* Upton, 21 N. Y. St. R. 560.)

[1] Smart *v.* Blanchard, 42 N. Hamp. 137. Unless the words are ambiguous, and their application doubtful, in which case the testimony of hearers as to how they understood the words is admissible. (*Id.;* and see Barton *v.* Holmes, 16 Iowa, 252; Smith *v.* Miles, 15 Vt. 245; §§ 97, 140, 141, *ante.*) In Leonard *v.* Allen (11 Cush. 241), an action for slander, not by direct words, but by expressions, gestures, and intonations of voice, it was held competent for witnesses who heard the expressions to state what they understood the defendant to mean by them, and to whom he intended to apply them. In Nelson *v.* Borchenius (52 Ill. 236), it was held that in an action for slander the testimony of the hearers as to the sense in which they understood the words is admissible. But such testimony is not conclusive upon the jury. Such testimony is admissible as tending to show what meaning hearers of common understanding would and did ascribe to the words.

stood the words published,[1] nor be permitted to state what meaning he understood the defendant to convey by the words,[2] nor the *impression* produced on his mind by the whole of the conversation.[3] The words being *unambiguous*, it is not competent for a witness to say that he understood the publisher to mean differently from the common import of the words.[4] Where the language is *ambiguous* and it is doubtful in what sense the publisher intended it, the question is in what sense the hearers understood it, for "the slander and damage consist in the apprehension of the hearers."[5] The ordinary sense of the words is to be taken as the sense intended by the publisher, unless the words are explained to import something different by other matter connected therewith.[6] Where it is first shown that something has occurred in consequence of which the words would convey a meaning different from their ordinary meaning, then the witness may be asked: What did you understand with reference to such an expression?[7] Where the charge was, "You (plaintiff) are a thief, a rogue, and a swindler," on not guilty pleaded, held, that the defendant could not prove circumstances not referred to and not known to the hearers at the time the

[1] Wright *v.* Paige, 36 Barb. 438; *ante*, § 140; *contra*, Foval *v.* Hallett, 10 Bradw. (Ill.) 265.

[2] Snell *v.* Snow, 13 Metc. 278. Defendant was charged with libel in an affidavit "that a note presented to him by Hiram Larrabee, in favor of J. D. Larrabee, with Alfred Anderson's name and mark, J. Gustafon and John Hart's names, is a note he (deponent John Hart) knows nothing about and the name John Hart was not written by him (deponent) or his orders and therefore is a forgery." On the trial a witness was asked: To whom did you understand the affidavit to refer? The witness answered: I understood it to refer to Anderson (plaintiff) that is the forgery; held that the question was improperly admitted. (Anderson *v.* Hart, 68 Iowa, 400.

[3] Harrison *v.* Bevington, 8 Car. & P. 708; *contra*, Niderver *v.* Hall, 67 Cal. 79.

[4] Pitts *v.* Pace, 7 Jones Law (N. Car.), 558; Sasser *v.* Rouse, 13 Ired. 142.

[5] Fleetwood *v.* Curley, Hob. 267 *b*; Binford *v.* Young, 115 Ind. 174; *ante*, note 2, p. 119.

[6] Hayes *v.* Ball, 72 N. Y. 420.

[7] Daines *v.* Hartley, 3 Ex. 200; 18 Law Jour. 81 Ex.; 12 Jur. 1093; Com'wealth *v.* Morgan, 107 Mass. 199; Berry *v.* Massey, 104 Ind. 486; Bradstreet *v.* Gill, 9 So. East. Rep. 753 (Texas); Fawcett *v.* Clark, 48 Md. 494; Elsworth *v.* Hayes, 71 Wis. 427; see § 281, *ante*.

charge was made, in order to qualify the meaning of the terms used.[1] The plaintiff and defendant being present at a tavern where there had been a raffle, defendant said, "I am surprised at R. allowing a blackleg in this room." On the trial, a witness being asked what he understood by "blackleg," answered, "A person in the habit of cheating at cards." Held, by Pollock, C. B., and Watson, B., that the evidence was proper; and by Martin and Bramwell, BB., that it was not proper.[2] Nor can a witness be asked to whom he understood the defamatory matter to apply.[3] Where the libel consisted of a statement in a circular letter published by the secretary of a society for the protection of trade, that "a bill drawn and accepted by the plaintiff was made payable at a banker's where he had no account;" held, that as the letter stated a specific fact which required no explanation, a witness could not be asked what he

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[1] Martin *v.* Loei, 2 Fost. & Fin. 654; Foval *v.* Hallett, 10 Bradw. (Ill.) 265.

[2] Barnett *v.* Allen, 3 Hurl. & Nor. 376; 1 Fost. & Fin. 125. Jury told to consider if words had conveyed meaning of a person who had gambled so as to be liable to a criminal prosecution. (*Id.*) Slander for the words "you are a *bunter*," on the trial plaintiff was asked what the word *bunter* meant, it was objected that as there was no innuendo and the word was not actionable *per se*, nor indeed had any meaning, the question of its acquired meaning could not be gone into, and by the court, that is so, there being no innuendo. (Rawlings *v.* Norbury, 1 Fost. & Fin. 341.) Evidence of meaning of "State Cop." admitted. (Com. *v.* Morgan, 107 Mass. 199.)

[3] Rangler *v.* Hummell, 37 Penn. St. R. 130; Eastwood *v.* Holmes, 1 Fost. & F. 347; People *v.* McDowell, 71 Cal. 194; Anderson *v.* Hart, 68 Iowa, 400; Herzman *v.* Oberfelder, 54 Iowa, 83; Held that a witness may say who is meant by the libel. (Smawley *v.* Stark, 9 Ind. 386; Russell *v.* Kelly, 44 Cal. 641; Blakeman *v.* Blakeman, 31 Minn. 396; see *ante*, § 97, note p. 115, and § 140.) It is for the jury to decide whether or not the language is concerning plaintiff. (Ryckman *v.* Delavan, 25 Wend. 186; rev'g White *v.* Delavan, 17 Wend. 49.) A witness cannot be asked whether or not he considered plaintiff to be the person alluded to. (*Id.; contra*, Miller *v.* Butler, 6 Cush. 71; McLaughlin *v.* Russell, 17 Ohio, 475; Morgan *v.* Livingston, 2 Rich. 573; Russell *v.* Kelly, 44 Cal. 641; Howe Machine Co. *v.* Sonder, 58 Ga. 64; Wilson *v.* Fall River Herald Pub. Co. 143 Mass. 581.) Alleged libel upon one Leo Oppenheim—Oppenheim's name was not mentioned in the libel, but it was claimed he was the person intended, and that he was pointed out by the words "The Pearl Street Tailor," and by the name "Leo." Held, that it was for the prosecution to show facts from which the jury might infer that Oppenheim was the person intended, and that the opinion of witnesses should not have been received. (People *v.* Parr, 42 Hun, 313.)

understood by finding a person's name in such a paper; but the judge permitted the question whether such statement had any other meaning beyond that which was expressed on its face.[1]

§ 385. Material matter of inducement, if put in issue, must be proved.[2] Immaterial matter of inducement may be rejected as surplusage, and need not be proved. Material matter of inducement, if not put in issue, is taken as admitted.[3] In such cases no proof of it is necessary, and no evidence respecting it is admissible. Matter of inducement is not put in issue by a plea of not guilty.[4] Matter of inducement may be proved by parol.[5] When the words are actionable only by reason of their relation to extrinsic facts, such facts must be proved; as where the words were charged as spoken of a constable, imputing misconduct in the execution of a bench warrant, the words not being actionable in themselves, it was held that the warrant must be proven.[6] Where the alleged libel was concerning the sale by plaintiff of certain leaden figures called "Pilgrims' signs," held, the plaintiff must prove the objects referred to were "commonly called Pilgrims' signs."[7] And in an action for a libel on a constable, alleged to have been pub-

[1] Humphreys *v.* Miller, 4 Car. & P. 7.

[2] "It is still necessary under the plea of not guilty to prove the colloquium." (Cooke on Defam. 145; Strader *v.* Snyder, 67 Ill. 404; Wilson *v.* Fitch, 41 Cal. 363; Chamberlain *v.* Vance, 51 Cal. 83; Nidever *v.* Hall, 67 Cal. 79.) In Doyley *v.* Roberts (3 Bing. N. C. 835; 5 Scott, 40), the jury negatived the colloquium that the words were spoken of plaintiff in his business of an attorney.

[3] Fradley *v.* Fradley, 8 Car. & P. 572; Heming *v.* Power, 10 M. & W. 567; Gwynne *v.* Sharpe, 1 Car. & Mar. 532.

[4] Gwynne *v.* Sharpe, 1 Car. & Mar. 532.

[5] Southwick *v.* Stevens, 10 Johns. 443.

[6] Kinney *v.* Nash, 3 N. Y. 177. Under a declaration setting out the substance of the words spoken as a charge of stealing, the plaintiff may prove that the words spoken, although not actionable in themselves, were rendered actionable by reason of certain extrinsic facts, by their referring to these facts, and by the manner in which they were used, although the declaration contains no averment that they were spoken with reference to any fact whatever. (Allen *v.* Perkins, 17 Pick. 369; Pond *v.* Hartwell, *Id.* 269.)

[7] Eastwood *v.* Holmes, 1 Fost. & Fin. 347.

lished concerning his conduct in the apprehension of persons engaged in stealing a dead body, it was averred what that conduct had been, and it was alleged that plaintiff had carried the body to Surgeons' Hall; held that the plaintiff must prove the inducement.[1] In an action against the editor of a newspaper for a libelous publication, it is admissible for the plaintiff to show articles in subsequent numbers of the same paper, for the purpose of proving that the plaintiff was the person intended to be defamed.[2]

§ 386. Pursuant to a rule already referred to (§ 315), the defamatory matter, so far as it goes, is evidence of the introductory averments.[3] (§ 189.) Thus for words spoken respecting the plaintiff's trade; if the words assume that, at the time they were spoken, the plaintiff was engaged in such trade, there is no need of proving that fact.[4] Where it was to be plainly inferred, from the general tenor of the libel, that it was the object of the writer to represent the plaintiff as holding a situation of trust and confidence, and that he had abused it, held that it was sufficient to sus-

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[1] Teesdale *v.* Clement, 1 Chit. R. 603; but this decision arose out of the peculiar form of the declaration. (See Ruel *v.* Tatnel, 43 Law Times, N. S. 507.)

[2] White *v.* Sayward, 33 Maine, 322; Russell *v.* Kelly, 44 Cal. 641; Peoples *v.* Ev'g News Asso. 51 Mich. 11.

[3] Rutherford *v.* Evans, 6 Bing. 451. In this case the plaintiff declared in respect of a libel upon him as "surveyor of the New England Company;" held sufficient for him to prove employment by a company generally known by that name.

[4] Hesler *v.* Degant, 3 Ind. 501; Rodebaugh *v.* Hollingsworth, 6 Ind. 339; Berryman *v.* Wise, 4 T. R. 366; and see Hea *v.* McBeath, 2 Kerr, 301 (N. Bruns.). Where, in an action for a libel against plaintiff, a medical practitioner, of and concerning him in his said practice, no evidence was offered of plaintiff being of any regular degree, the libel stating him to be a quack, and that certain persons had the misfortune to come within his doctrinal prescriptions; held, that if the jury considered that the libel spoke of him as a medical practitioner, the case was not withdrawn from their consideration, although they might not give the same damages as to a person proved to be a regular practitioner. (Long *v.* Chubb, 5 Car. & P. 55.) Where the declaration alleged that there were such states as C. and B., and plaintiff and one H. had been appointed minister plenipotentiary and consul general respectively from those states to this country, the libel on the face of it admitted that there were such states; and it being proved at the trial that plaintiff had been appointed such officer for the one state, and H. for the other, held that the allegations were sufficiently made out. (Yrissari *v.* Clement, 3 Bing. 432.)

tain the allegation in the declaration of plaintiff's holding such situation.[1] A declaration in libel stated as inducement that the plaintiff was a surgeon and member of the College of Surgeons, which said college had the power of expelling persons guilty of unprofessional conduct, and of unprofessionally advertising themselves and their cures. The libel was alleged to be published of and concerning the plaintiff as such surgeon, and of and concerning the said college and its said power. One of the libels complained of contained a statement that the college had the power of expelling its members. The second plea was that the plaintiff was not a surgeon and member of the College of Surgeons having the power of expelling persons guilty of unprofessional conduct, and of unprofessionally advertising themselves and their cures. Held, that the traverse put in issue the power of the college to expel, and that the statement in the libel itself was not sufficient evidence of such power.[2]

§ 387. It is a much vexed question whether in an action for slander or libel the plaintiff may, in aggravation of the damage he has sustained, introduce evidence of his good reputation prior to the publication complained of; on this point, as upon all the others relating to the proceedings in an action, we can do no more than call attention to the decisions upon the subject. Although it may be true that

[1] Bagnall *v.* Underwood, 11 Price, 621. In an action for a libel the defendant pleaded justification, and in his plea introduced certain passages from a pamphlet written by plaintiff, upon which plea issue was joined. Held, that this was not so far an adoption of the whole pamphlet as true, as to enable plaintiff to read other passages from it, to show that defendant was the aggressor in the controversy which lead to its publication. (Kearney *v.* Gough, 5 Gill & Johns. 457.)

[2] Wakley *v.* Healey, 18 Law Jour. Rep. 426, Ex.; 13 Law Times, 259; 4 Ex. 53. The general issue admits the character in which plaintiff sues. (Yeates *v.* Reed, 4 Blackf. [Ind.] 463.) Except the cases where the defamatory matter charges that plaintiff is not legally qualified to exercise his calling, and such want of qualification is at issue, plaintiff need not prove his qualification; it is sufficient to show he exercised such calling. (Berryman *v.* Wise, 4 T. R. 366; Cannell *v.* Curtis, 2 Bing. N. C. 228; Smith *v.* Taylor, 1 Bos. & Pul. N. R. 196; Rutherford *v.* Evans, 6 Bing. 451.) It is presumed he was duly licensed or qualified. (See § 183 and note to § 302, *ante*.)

in an action for slander or libel the reputation of the plaintiff is in issue, it is nevertheless true that, as a general rule, the reputation of the plaintiff is assumed to be good until the contrary is shown (§§ 313, 314); and that, unless some blot upon the plaintiff's reputation is set up as a mitigating circumstance, or his reputation is otherwise assailed, he is not permitted for any purpose to introduce any evidence on the subject; thus, it has been held that evidence cannot be given of the fairness of the plaintiff's character (reputation), even where a justification is pleaded, unless attacked by the defendant.[1] But held, also, that where the general issue only is pleaded, the plaintiff may give evidence of his good character.[2] In slander for the charge of perjury, where the plaintiff is permitted to give evidence of his character to protect himself, it is error to confine him to evidence of his general character for truth and veracity.[3] A witness called by the plaintiff in an action of

[1] Shipman *v.* Burrows, 1 Hall, 399; Harcourt *v.* Harrison, 1 Hall, 474; Cornwall *v.* Richardson, 1 Ry. & M. 305; 1 C. & Y. 106; Severance *v.* Hilton, 4 Foster, 147; McGee *v.* Sodusky, 5 J. J. Marsh, 185; Inman *v.* Foster, 8 Wend. 602; Dame *v.* Kenney, 5 Fost. 318; Petrie *v.* Rose, 5 Watts & Serg. 364; Holley *v.* Burgess, 9 Ala. 728; Harbison *v.* Shook, 41 Ill. 142; Wright *v.* Shroeder, 2 Curtis C. C. 548; Martin *v.* Hooker, 7 Coldw. (Tenn.) 130; Chubb *v.* Gsell, 34 Penn. St. R. 114; Miles *v.* Van Horn, 17 Ind. 245; Haun *v.* Wilson, 28 Ind. 296; and see Rhodes *v.* James, 7 Ala. 574; Rector *v.* Smith, 11 Iowa, 302; Tibbs *v.* Brown, 2 Grant's Cases (Penn.), 39; Flittcraft *v.* Jenks, 3 Whart. 158; McCabe *v.* Platter, 6 Blackf. 405; *contra*, Scott *v.* Peebles, 2 Sm. & M. 546; Byrket *v.* Monohon, 7 Blackf. 83; Adams *v.* Lawson, 17 Gratt. 250; Shroyer *v.* Miller, 3 W. Va. 158; Romayne *v.* Duane, 3 Wash. C. C. 246; Hitchcock *v.* Moore, 37 No. West. Rep. 914. It is not competent for plaintiff to make proof of his good character, in reply to evidence of the truth of the charge. (Houghtaling *v.* Kilderhouse, 1 N. Y. 530; affi'g 2 Barb. 149; Matthews *v.* Huntley, 9 N. Hamp. 146; Springstein *v.* Field, Anthon, 252; Her *v.* Cromer, Wright, 441; Stow *v.* Converse, 3 Conn. 325.) Where the charge is such that defendant's evidence in justification, though insufficient to prove it, has a tendency to affect the general character of plaintiff, on the subject of the charge, he may reply by evidence of general good character in that particular. (Wright *v.* Shroeder, 2 Curtis C. C. 548.)

[2] Williams *v.* Greenwade, 3 Dana, 432; King *v.* Waring, 5 Esp. Cas. 14; Bennett *v.* Hyde, 6 Conn. 24; Romayne *v.* Duane, 3 Wash. C. C. 246; Sample *v.* Wynn, Busbee Law (N. Car.), 319; Howell *v.* Howell, 10 Ired. 82; Burton *v.* March, 6 Jones Law (N. Car.), 409; Williams *v.* Haig, 3 Rich. (So. Car.) 362; Shroyer *v.* Miller, 3 W. Va. 158.

[3] Steinman *v.* McWilliams, 6 Barr, 170. Where the charge was that the plaintiff, a governess, was a person of bad temper, she was allowed to give

slander, in support of the plaintiff's general character, stated that some persons spoke very ill and some very well of him. Held, that the plaintiff might ask the witness in what particular some people spoke against him.[1]

§ 388. Where the language is actionable and the publication does not appear to be on any occasion which renders it privileged, there the language is presumed to be false and malicious, *i. e.*, published without lawful excuse, and no other evidence of malice is necessary.[2] But where the publication is *prima facie* privileged, the onus of proving malice in fact, *i. e.*, that the defendant was actuated by motives of personal spite or ill-will, is upon the plaintiff.[3] The existence or non-existence of this intent is a question for the jury.[4] "The want of proof on the part of the de-

general evidence as to her temper. (Fountain *v.* Boodle, 3 Q. B. Rep. 5.)

[1] Leonard *v.* Allen, 11 Cush. 241. Plaintiff cannot show he was less esteemed by a particular person. (Crosby *v.* Cobb, 3 How. Pr. R. N. S. 37.)

[2] Fry *v.* Bennett, 5 Sandf. 54; Sanderson *v.* Caldwell, 45 N. Y. 398; Wilson *v.* Noonan, 35 Wis. 321; Estes *v.* Antrobus, 1 Mo. 197; McKee *v.* Ingalls, 4 Scam. 30; Parke *v.* Blackiston, 3 Harring. 373; Kinney *v.* Hosea, *Id.* 397; Farley *v.* Ranck, 3 Watts & Serg. 554; Erwin *v.* Sumrow, 1 Hawks, 472; Dexter *v.* Spear, 4 Mason, 115; Bodwell *v.* Osgood, 3 Pick. 379; Weaver *v.* Hendrick, 30 Mo. (9 Jones), 502; Roberts *v.* Camden, 9 East, 93; Usher *v.* Severance, 20 Me. 9; Yates *v.* Reed, 4 Blackf. 463; Gilmer *v.* Eubank, 13 Ill. 271; Root *v.* King, 7 Cow. 613; affi'd 4 Wend. 113; Trabue *v.* Mays, 3 Dana, 138; Byrket *v.* Monohon, 7 Blackf. 83; Hudson *v.* Garner, 22 Mo. (1 Jones), 423; Curtis *v.* Mussey, 6 Gray, 261; Gabe *v.* McGinness, 68 Ind. 538. The jury cannot infer the want of malice from the fact that the words were spoken only once, and stated as a common report. (Mason *v.* Mason, 4 N. Hamp. 110; § 73, *ante*.) The question of malice should not be left to the jury unless the occasion be privileged. (Barr *v.* Moore, 87 Pa. St. 385; Neeb *v.* Hope, 2 Central Reporter, 72; 111 Penn. St. 145. The legal inference of malice cannot be rebutted by evidence. (Scranton *v.* Chase, 4 Law Times, N. S. 17 [Pa.].) By statute in California malice is not to be inferred from the fact of publication. (Sesler *v.* Montgomery, 19 Pac. Rep. 686 [Cal.].) In Massachusetts, Maine, and Connecticut, by statute, in an action for libel, defendant may give evidence of intention, and unless plaintiff prove malice in fact, he can recover nothing but his actual damage proved and specially alleged in his declaration. (See Moore *v.* Stevenson, 27 Conn. 14; Hotchkiss *v.* Porter, 30 Conn. 414.) Where the words are actionable *per se*, no evidence need be given of actual damages to the character, nor of the mental sufferings of the plaintiff. (Boldt *v.* Budwig, 19 Neb. 739; Brooks *v.* Dutcher, 22 Neb. 644.)

[3] Clark *v.* Molyneaux, L. R. 3 Q. B. D. 237; Erber *v.* Dun, 12 Fed. Rep. 526. To rebut privilege and show malice, plaintiff may introduce a letter written by defendant two years later containing similar charges. (Austin *v.* Remington, 46 Conn. 117; and see Mielenz *v.* Quasdorf, 68 Iowa, 726.)

[4] Pattison *v.* Jones, 8 B. & C. 578; 3 M. & R. 101; Bromage *v.* Prosser,

fendant that the slander was true, is not enough (to prove malice), and (where the publication is conditionally privileged) the plaintiff, to maintain his action, must show that the charge was false, before he can ask the jury to find the slander to be malicious."[1]

§ 389. It is said that falsehood *may* be evidence of malice.[2] But the mere falsity of a publication, without its being shown that the publisher knew it to be false, is not *per se* evidence of malice.[3] Thus, where the alleged libel was a complaint made by the defendant of the incompetency of the plaintiff, a surveyer, who had been sent to him

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4 B. & C. 247; 6 Dow. & R. 296; Child *v.* Affleck, 9 B. & C. 403; Kelly *v.* Partington, 4 B. & Ad. 700; 3 N. & M. 116; Toogood *v.* Spyring, 4 Tyrw. 582; 1 C. M. & R. 181; Kine *v.* Sewell, 3 M. & W. 297; Wright *v.* Woodgate, 2 C. M. & R. 573; Tyrw. & G. 12; Liddle *v.* Hodges, 2 Bosw. 537; Somerville *v.* Hawkins, 10 C. B. 583; 15 Jurist, 450. The question of malice is for the jury to determine, upon all the facts and conversations in connection with which the words were spoken. (McKee *v.* Ingalls, 4 Scam. 30; Erwin *v.* Sumrow, 1 Hawks, 472; Smith *v.* Youmans, Riley, 88; Robinson *v.* May, 2 J. P. Smith, 3; Roberts *v.* Camden, 9 East, 93; Coleman *v.* Playsted, 36 Barb. 26; People *v.* Seaman, 6 N. Y. St. Rep. 765.) Where the charge was that the conduct of plaintiff was "most disgraceful and dishonest." The conduct of plaintiff was of an equivocal nature, and might *bona fide* be supposed by defendant to be such as he described it, held, not of itself evidence of malice, and the court did right to order a verdict for the defendant. (Spill *v.* Maule, Law Rep. 4 Ex. 232.) Where there is evidence from which the jury may find that defendant knew the charge to be untrue, defendant must disprove malice. The knowledge of its untruth is some evidence of malice. (Hartwell *v.* Vesey, 3 Law Times, N. S. 275.) In judging of the malicious character of an alleged libel, the jury may take into consideration the whole publication; and if it contains statements concerning other persons, which are malicious, the jury may infer therefrom that what is said of plaintiff is also malicious. (Miller *v.* Butler, 6 Cush. 71, and see Caddy *v.* Barlow, 1 M. & R. 275; § 399, *post.*)

[1] Fowles *v.* Bowen, 30 N. Y. 26; and see Edwards *v.* Chandler, 14 Mich. 471; Rogers *v.* Clifton, 3 B. & P. 587; Mosier *v.* Stoll, 20 No. East. Rep. 752 (Ind.) "Man," says Channing, "is not accountable for the *rightness*, but he is accountable for the *uprightness* of his views."

[2] Fairman *v.* Ives, 5 B. & Ald. 645; Palmer *v.* Hummerston, 1 C. & E. 36. Where part of a defamatory publication is shown to be true, the falsehood of the other part may be left to the jury as evidence of malice. (Blagg *v.* Sturt, 10 Q. B. 899; 8 Law Times, 135; Hinman *v.* Hare, 6 Cent. Rep. 44; *ante*, note 2, p. 399.) A lie is never privileged. It always has malice coiled up within it. When a man coins and utters a lie, or repeats it *knowing* it to be false, the law implies malice. (Briggs *v.* Garrett, 111 Penn. St. 404.) In Samuels *v.* Even. Mail Asso. (75 N. Y. 604; rev'g S. C. 9 Hun, 288), it was held that proof of falsity was sufficient evidence of malice to sustain a verdict for exemplary damages.

[3] Kent *v.* Bongartz, 15 R. I. 22.

for employment, and the *innuendo* charged that the defendant meant that the plaintiff was not a competent and skillful surveyor, held, that evidence of general competency and abilities of the plaintiff was inadmissible to show malice.[1] Making a statement which is untrue to the knowledge of the party making it, is evidence of malice.[2] On the trial of an action for slander, the plaintiff's witnesses proved that the slanderous statements were untrue in fact, but also that they were the natural and reasonable inferences from what took place, and which they professed to describe, and that the defendant was present at the occurrence to which the slanderous statements referred. The judge ruled that the occasion was privileged, but that the plaintiff must have a verdict unless the defendant proved that the statements were made without malice. Held, a right direction; the presence of the defendant being some evidence that the statements were made with a knowledge that they were untrue.[3] To show that the defendant knew of the falsity of a charge of theft published by him, the plaintiff was permitted to prove that after the time when the theft was alleged to have been committed by plaintiff, the defendant continued upon friendly terms with plaintiff.[4]

§ 390. The plaintiff may prove, in aggravation of the damages, his rank and condition in society,[5] malice

[1] Brine *v.* Bazalgette, 3 Ex. Rep. 692; 18 Law Jour. Rep. 348, Ex.; Caulfield *v.* Whitworth, 18 Law Times, N. S. 527. Defendant's knowledge of the falsity of the charge may be shown. (People *v.* Sherman, 103 N. Y. 513.)

[2] Fountain *v.* Boodle, 5 Q. B. 5; Harris *v.* Thompson, 13 C. B. 333; Sexton *v.* Brock, 15 Ark. 345; Farley *v.* Ranck, 3 Watts & Serg. 554; Harwood *v.* Keech, 6 Sup. Ct. Rep. (T. & C.) 665; 4 Hun, 389; Locke *v.* Bradstreet Co. 22 Fed. Rep. 771 (Minn.).

[3] Hartwell *v.* Vesey, 3 Law Times, N. S. 275. In slander, with general issue only pleaded, plaintiff cannot, in the first instance, give evidence tending to prove defendant's knowledge of the falsity of the words spoken. (Hartranft *v.* Hesser, 34 Penn. St. R. 117.)

[4] Burton *v.* March, 6 Jones Law (N. Car.), 409.

[5] Tillotson *v.* Cheetham, 3 Johns. 56; Hosley *v.* Brooks, 20 Ill. 115; Larned *v.* Buffinton, 3 Mass. 546; Bodwell *v.* Swan, 3 Pick. 376; Howe *v.* Perry, 15 Pick. 506; Smith *v.* Lovelace, 1 Duvall (Ky.), 215; Justice *v.*

(ill-will) in defendant (§ 392, *post*), that defendant knew the charge to be false,[1] other publication, of words *not actionable*,[2] or which are actionable,[3] if, as is said, the right of action on such words is barred by the statute of limitations,[4] and subsequent defamatory remarks upon the plaintiff,[5] and after the commencement of the action.[6] In slander of a physician in his profession, the currency of

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Kirlin, 17 Ind. 588; Peltier *v.* Mict, 50 Ill. 511; Klumph *v.* Dunn, 66 Penn. St. R. 141; *contra*, see Reeves *v.* Winn, 97 No. Car. 246; Gandy *v.* Humphries, 35 Ala. 617. Unless where mitigating facts are pleaded. (Blanchard *v.* Tulip, 3 Hun, 638.) Plaintiff cannot give evidence of his poverty in aggravation. (Perrine *v.* Winter, 73 Iowa, 645.)

[1] Bullock *v.* Cloyes, 4 Vt. 304; Stow *v.* Converse, 3 Conn. 325; *ante*, § 389.

[2] Allensworth *v.* Coleman, 5 Dana, 315; The State *v.* Riggs, 39 Conn. 498; Simonds *v.* Carter, 32 N. H. 458; Rosenwald *v.* Hammerstein, 12 Daly, 377. Slanderous words, not laid in the declaration, cannot be proved in aggravation of damages. (Vincent *v.* Dixon, 5 Ind. [Porter], 270; Schenck *v.* Schenck, Spencer [20 N. J. L. R.], 208; Botelar *v.* Bell, 1 Md. 173; Medaugh *v.* Wright, 27 Ind. 137; *post*, § 394.)

[3] Lee *v.* Huson, Peake, 166; Bond *v.* Douglas, 7 C. & P. 626; but see Cook *v.* Field, 3 Esp. 133.

[4] Titius *v.* Sumner, 44 N. Y. 266; Brickett *v.* Davis, 21 Pick. 404; Throgmorton *v.* Davis, 4 Blackf. 174. But words not laid in the declaration cannot be proved to make the words laid actionable. (Jones *v.* Jones, 1 Jones Law [N. Car.], 495.) And where words actionable in themselves, and not set out in the declaration, are admitted in evidence to prove malice, the court must caution the jury that they are not to increase the damages on account of such words. (Letton *v.* Young, 2 Metc. [Ky.] 558; Barrett *v.* Long, 8 Ir. Law Rep. 331; Scott *v.* McKinnish, 15 Ala. 662; Burson *v.* Edwards, 1 Carter [Ind.], 164; see § 392, *post*.) A publication by defendant after the commencement of the action cannot be proved to aggravate damages. (Frazier *v.* McCloskey, 60 N. Y. 337.)

[5] Chubb *v.* Westley, 6 C. & P. 436; Hanners *v.* McClelland, 76 Iowa, 318; *post*, § 394. Where the words complained of are ambiguous—held that proof of the publication subsequently of other words of the same import is inadmissible. (Pearce *v.* Ormsby, 1 M. & Rob. 455; Symmons *v.* Blake, *Id.* 447.)

[6] *Post*, §§ 394, 395; Barwell *v.* Adkins, 2 Sc. N. S. 11; Hesler *v.* Degant, 3 Ind. 501; Williams *v.* Harrison, 3 Mo. 411; Scrimper *v.* Heilman, 24 Iowa, 505; Kean *v.* McLaughlin, 2 S. & R. 469; *contra*, McGlemery *v.* Keller, 3 Blackf. 488.

In an action for a libel in a weekly periodical publication, a witness was allowed to prove a purchase of a copy after the action brought. (Plunkett *v.* Cobbett, 2 Selw. N. P. 1042; 5 Esp. 136.) If a defendant, after action brought, issues a new publication, mingling the matter for which he has been sued with new libelous matter, he cannot call upon the court to analyze the publication, and separate what refers to the former libel from the new slanderous matters it may contain, but the whole may be read in evidence. (Schenck *v.* Schenck, Spencer [20 N. J. L. R.], 208.) As to admissibility of proof of repetition to aggravate the damages, see Burson *v.* Edwards, 1 Carter (Ind.), 164; Shoulty *v.* Miller, *Id.* 544; Lanter *v.* McEwen, 8 Blackf. 495; Forbes *v.* Myers, *Id.* 74; Leonard *v.* Pope, 27 Mich. 145. Repetition

the slanderous report in the place of his practice, following the utterance of the same by the defendant, may be given in evidence, as well as the effect of such report upon the professional gains of the plaintiff, in aggravation of damages, without strict proof connecting the current report with the slander of the defendant; the fact of such connection being for the jury, and not for the court to pass upon.[1] A libel charged M. with kidnapping a free colored man, and referred to two numbers of a newspaper which showed the transaction *in full*. *Held*, an aggravation of the libel.[2] If the publication was in a newspaper or pamphlet, the plaintiff may, to aggravate the damages, prove the extent of the circulation of that paper at the time of the publication of the alleged libelous matter,[3] and

in another paper. (Vifquaim *v.* Finch, 30 Alb. Law Jour. 398; 15 Neb. 505.) Proof of a repetition of the words *after* action commenced not permissible. (Frazier *v.* McCloskey, 60 N. Y. 337; 2 Sup. Ct. Rep. [T. & C.] 266.)

[1] Rice *v.* Cottrel, 5 R. I. 340. In Hotchkiss *v.* Lothrop (1 Johns. 286; Dole *v.* Lyon, 10 Johns. 447), doubted if defendant being indemnified was not admissible in aggravation. *Semble* not, as indemnity void. (*Ante*, § 305.) Where plaintiff in an action for a libel charging her with theft, published in a newspaper, had alleged as special damage that in consequence of said libel she had been discharged from the employment of one W., on the trial plaintiff offered evidence that a few days after the publication of the libel, W. had said to her that there were flying reports in the newspapers about her and her sister, and that it would injure his shop to have such girls there, and had thereupon discharged them—held that such evidence was admissible in support of the allegation of special damage, although there was no evidence either that W. had seen the publication in question, or as to what reports and what newspapers he referred to. (Moore *v.* Stevenson, 27 Conn. 14.) Plaintiff cannot give in evidence to enhance damages that detectives put his name in their books, without showing that defendant was connected with such act of the detectives. (Garvey *v.* Wayson, 42 Md. 178.) Hoey *v.* Felton (11 C. B. N. S. 142) was an action for false imprisonment with special damage. The special damage attempted to be proved was that if plaintiff had attended at a certain place at a certain time he could have obtained employment; that by reason of the imprisonment he felt too unwell to attend at said place and time, and thereby lost the opportunity of being employed—held too remote.

[2] Nash *v.* Benedict, 25 Wend. 645.

[3] Bigelow *v.* Sprague, 140 Mass. 425. Evidence that various persons called plaintiff's attention to the libelous publication is admissible as showing the extent to which the public has taken notice of the article. (Park *v.* Detroit Free Press Co. 40 No. West. Rep. 731 [Mich.].) But evidence of republication of the alleged libel in another journal is not admissible. (Vifquaim *v.* Finch, 30 Alb. Law Jour. 398 [Neb.].) When general damages only are claimed, plaintiff cannot show he

to prove this, may give a copy of the defendant's paper in evidence containing a statement of the amount of circulation.[1]

§ 391. The plaintiff, to aggravate damages, cannot prove the defendant's wealth,[2] nor that it was currently reported that defendant had charged the plaintiff with the crime mentioned in the declaration,[3] nor that the defendant, when requested, refused to give the name of the author of the alleged defamatory language.[4] Plaintiff may give evidence of distress of mind in aggravation,[5] or that he has a family,[6] or the nature of his business,[7] and, if charged with having been sued for breach of promise, may show he is a married man,[8] and held that plaintiff may show his condition in life, not merely from a pecuniary standpoint, but as to family and connection, as bearing upon the question of damages.[9]

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was less esteemed by any particular person. (Crosley *v.* Cobb, 3 How. Pr. R. N. S. 39.) Proof of the existence of a rumor in the neighborhood in reference to plaintiff is not admissible on his behalf to increase his damages. (Prime *v.* Eastwood, 45 Iowa, 640.)

[1] Fry *v.* Bennett, 28 N. Y. 330.

[2] Myers *v.* Malcolm, 6 Hill, 292; Ware *v.* Cartledge, 24 Ala. 622; Palmer *v.* Haskins, 28 Barb. 90; Austin *v.* Bacon, 19 N. Y. St. Rep. 662; Morris *v.* Barker, 4 Harring. 520; but see Fry *v.* Bennett, 4 Duer, 247; Buckley *v.* Knapp, 48 Mo. 152; Bennett *v.* Hyde, 6 Conn. 24; Case *v.* Marks, 20 Conn. 248; Rosewater *v.* Hoffman, 24 Neb. 222; Adcock *v.* Marsh, 8 Ired. 360; Karney *v.* Paisley, 13 Iowa (5 With.), 89; Humphries *v.* Parker, 52 Maine, 502; Stanwood *v.* Whitmore, 63 *Id.* 209; Hosley *v.* Brooks, 20 Ill. 115; Harbison *v.* Shook, 41 Ill. 142; Lewis *v.* Chapman, 19 Barb. 252; Kunkel *v.* Markell, 26 Md. 391; Storey *v.* Earley, 86 Ill. 461; *contra*, Herzman *v.* Oberfelder, 54 Iowa, 83; Perrine *v.* Winter, 73 Iowa, 645; Young *v.* Kuhn, 9 So. West. Rep. 860 (Texas); *contra*, Reeves *v.* Winn, 97 No. Car. 246; Bowden *v.* Bailes, 101 No. Car. 612; Barkly *v.* Copeland, 74 Cal. 1; Brown *v.* Barnes, 39 Mich. 211, and note thereto, 33 Amer. Rep.; Hayner *v.* Cowden, 27 Ohio St. 292; Hunt *v.* R. R. Co. 26 Iowa, 366; Larned *v.* Buffington, 3 Mass. 546.

[3] Leonard *v.* Allen, 11 Cush. (Mass.) 241.

[4] Harle *v.* Catherall, 14 Law Times, N. S. 801.

[5] Terwilliger *v.* Wands, 17 N. Y. 54; Wilson *v.* Goit, *Id.* 442; *contra*, Burk *v.* McBain, 29 Mich. 260; Swift *v.* Dickerman, 31 Conn. 285; Chesley *v.* Thompson, 137 Mass. 136; Trelker *v.* Butter, 15 Bradw. (Ill.) 209; Rea *v.* Harrington, 58 Vt. 81; *ante*, note 1, p. 39; and p. 520, note 5.

[6] Rhodes *v.* Naglee, 66 Cal. 677.

[7] Reeves *v.* Winn, 97 No. Car. 246.

[8] Morey *v.* Morn. Jour. 17 N. Y. St. Rep. 266.

[9] Dixon *v.* Allen, 69 Cal. 527; Smith *v.* Cook, 1 Alb. L. J. 162.

§ 392. The plaintiff may prove express malice—*i. e.*, ill-will or hostility on the part of the defendant towards the plaintiff—either to aggravate the damages[1] or to defeat a defense of privileged publication.[2] To establish such malice, the plaintiff may, it is held, in some cases, give in evidence other publications by the defendant of defamatory language concerning the plaintiff, whether it be the same as or other than the language declared upon if of the like import.[3] But the better opinion appears to be, that evi-

[1] Fry *v.* Bennett, 28 N. Y. 330; True *v.* Plumley, 36 Maine (1 Heath), 466; Sawyer *v.* Hopkins, 9 Shep. 268; Jellison *v.* Goodwin, 43 Maine, 287; 2 Greenl. Ev. § 418; Shilling *v.* Carson, 27 Md. 175. Until some of the actionable words laid have been proved, evidence of the *quo animo* of the defendant is inadmissible. (Abrams *v.* Smith, 8 Blackf. 95.) Where a newspaper is conducted by a partnership, the malice of one partner is imputable to his co-partners, although a statute exacts proof of actual malice. (Lothrop *v.* Adams, 133 Mass. 471.) Defendant is not responsible for the malice of the person who supplied him with the statement complained of, such person not being his servant. (Bradley *v.* Cramer, 66 Wis. 297.) Where due caution is exercised in employment of editors, the proprietor of a paper who took no part in the publication is not responsible in punitive damages for the acts of such editor. (McArthur *v.* Detroit Daily Post Co. 16 Mich. 447; Reilly *v.* Scripps, 38 Mich. 10.)

[2] Babonneau *v.* Farrell, 15 C. B. 360; 24 Law Jour. Rep. N. S. 9 C. P.; 1 Jur. N. S. 14; Littlejohn *v.* Greeley, 13 Abb. Pr. Rep. 41; Suydam *v.* Moffat, 1 Sandf. 459; Root *v.* King, 4 Wend. 113; Garrett *v.* Dickerson, 19 Md. 418; see Holt *v.* Parsons, 23 Texas, 9; Bowden *v.* Bailes, 101 No. Car. 612. It is no objection to a recovery for the slanderous words charged, that the publication of the same words has been proved against defendant in a former action between the same parties, for the purpose of proving malice. (Swift *v.* Dickerman, 31 Conn. 285; Campbell *v.* Butts, 3 N. Y. 173.) Where privilege is shown, express malice must be proved, or plaintiff will be nonsuited. (Caulfield *v.* Whitworth, 16 Weekly Rep. 936.)

[3] Burson *v.* Edwards, 1 Carter (Ind.), 164; Pearce *v.* LeMaitre, 6 Sc. N. C. 607; 5 Man. & G. 700; Delegall *v.* Highley, 8 C. & P. 444; Elliott *v.* Boyles, 31 Penn. St. R. 65; The State *v.* Jeandell, 5 Harring. 475; Price *v.* Wall, 2 Quart. Law Jour. 63; Cavenagh *v.* Austin, 42 Vt. 576; Johnson *v.* Brown, 57 Barb. 118; Meyer *v.* Bohlfing, 44 Ind. 238; Clapp *v.* Devlin, 35 Superior Ct. Rep. (3 J. & S.) 170; Alpin *v.* Morton, 21 Ohio St. 536; Prime *v.* Eastwood, 45 Iowa, 640; Knapp *v.* Fuller, 55 Vt. 311. Proof may be given of the publication of other words of like import. (Thompson *v.* Bowers, 1 Doug. [Mich.] 321; Stearns *v.* Cox, 17 Ohio, 590; Taylor *v.* Moran, 4 Metc. [Ky.] 127; Rosenwald *v.* Hammerstein, 12 Daly, 377.) Extracts from a newspaper, being separate and independent libels not declared on, may be offered in evidence to prove express malice, or as showing the *quo animo;* such words cannot be made the foundation of a recovery of damages for an injury plaintiff may have suffered from them, but can only affect the damages by showing the degree of malice. (Van Derveer *v.* Sutphin, 5 Ohio, N. S. 293; Markham *v.* Russell, 12 Allen [Mass.], 573; see Cheritree *v.* Roggen, 67 Barb. 124.)

dence of a charge of a *different nature*, and at a different time from that alleged in the declaration, is inadmissible to prove malice or for any purpose.[1] This is in effect only another form of the rule that actionable words not counted upon cannot be given in evidence,[2] unless a suit upon them is barred by the statute of limitations,[3] and their admission, where the statute has run, is opposed to principle, as it in effect restores a cause of action which has been taken away by the law.[4] It seems clear that a repetition by the defendant of the defamatory matter complained of is admissible to prove malice in fact,[5] and it is said that within this rule any act or language of the defendant tending to show malice beyond that implied by the original publication, the subject of the action, may be proved.[6]

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[1] Howard *v.* Sexton, 4 N. Y. 157. Although in slander plaintiff, to prove the *animus*, may show a repetition of the words, or of such as show the same train of thought, yet he cannot give in evidence other words which may be the subject of another action; held, also, that it appearing that plaintiff had recovered in another action against the defendant's son, what passed after the verdict, by way of proposal to compromise the second action was admissible to show that it was not vexatiously prosecuted. (Defries *v.* Davis, 7 C. & P. 112.)

[2] Rundell *v.* Butler, 7 Barb. 260; Mead *v.* Daubigny, Peake, 125; and see Campbell *v.* Butts, 3 N. Y. 173; Keenholts *v.* Becker, 3 Denio, 346; Thomas *v.* Croswell, 7 Johns. 264; *contra*, Duvall *v.* Griffith, 2 Har. & Gill, 30; Scott *v.* McKinnish, 15 Ala. 662; Long *v.* Chubb, 5 C. & P. 55; Bartow *v.* Brands, 3 Green (N. J.), 248; Brittain *v.* Allen, 2 Dev. 120; 3 Dev. 167. In Stern *v.* Lowenthal (77 Cal. 340), Sharpstein, J., after citing § 392 of Townshend on Slander, says: "In that view of the question we concur."

[3] Inman *v.* Foster, 8 Wend. 602; Throgmorton *v.* Davis, 4 Blackf. 174; Flamingham *v.* Boucher, Wright, 746; see, also, Lincoln *v.* Chrisman, 10 Leigh, 338; Ev'g Jour. Asso. *v.* McDermott, 15 Vroom, 430. In an action of slander for words imputing perjury, an affidavit of defendant, on which an indictment had been preferred, and which had been made so long before as to be barred by the statute of limitations, charging plaintiff with the same perjury set out in the declaration, is admissible in evidence as proof of the repetition of the same words in a different form, and with more deliberation, and to show the *quo animo*. (Randall *v.* Holsenbake, 3 Hill [S. Car.], 175.)

[4] Root *v.* Lowndes, 6 Hill, 518.

[5] Even. Jour. Asso. *v.* McDermott, 44 N. J. Law, 430; Fahr *v.* Hayes, 50 N. J. L. R. 275; Halley *v.* Gregg, 76 Iowa, 563; Knapp *v.* Fuller, 55 Vt. 311; Barwell *v.* Adkins, 1 Man. & G. 807; Behee *v.* Mo. Pac. R. R. 9 So. West. Rep. 449.

[6] Fry *v.* Bennett, 28 N. Y. 328; Johnson *v.* Brown, 57 Barb. 118. Damages recovered for previous slander may be given in evidence to show malice. (Symmons *v.* Blake, 1 M. & Rob. 477.) Where, in slander, plaintiff introduces evidence tending to show that defendant repeated the same words in another conversation, defendant is entitled to the whole of that conversation. (Ferry *v.* Breed,

§ 393. In an action for libel, the defendant pleaded the general issue, and also a plea under the 6th & 7th Vict. c. 96, denying actual malice, and stating an apology. On the trial, the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of—held that these publications were admissible in evidence;[1] but the court should in such a case call attention to the distance of time elapsed before the subsequent statements, and that those statements might have referred to some other and subsequent matter, so as not to show malice at the time of the publication complained of.[2]

§ 394. A plaintiff may, to prove malice, give evidence of a publication by the defendant made subsequently to the publication declared upon, when the subsequent publication is of a like import with that declared upon, or relating thereto, or is not actionable of itself, or explains any ambiguity in the matter declared upon.[3] And in an

117 Mass. 155.) Plaintiff is not limited to proof of the speaking on the occasion alleged in the complaint, but may, for the purpose of showing the motives of defendant and the extent of the injury, show that defendant repeated substantially the same charge on other occasions, at any time before the commencement of the action. (Distin *v.* Rose, 69 N. Y. 85; aff'g s. c. 7 Hun, 83; to the like effect see, The State *v.* Riggs, 37 Conn. 498–503; Reitan *v.* Goebel, 33 Minn. 151; Gribble *v.* Pioneer Press Co. 34 Minn. 342; Larrabee *v.* Minn. Tribune Co. 36 Minn. 141; Halley *v.* Gregg, 76 Iowa, 563. Ward *v.* Dick, 47 Conn. 300; Flanders *v.* Groff, 25 Hun, 553; Younger *v.* Duffin, 26 Hun, 442; Cornell *v.* Day, 18 Week. Dig. 97; Cruikshank *v.* Gordon, 48 Hun, 308; Schremper *v.* Heilman, 24 Iowa, 505.) Proof of repetition since commencement of action not admissible. (Holmes *v.* Brown, Kerby, 151; Barr *v.* Moore, 87 Penn. St. 385.)

[1] Barrett *v.* Long, 3 Ho. of Lords Cas. 395; 8 Ir. Law Rep. 331; Adkins *v.* Williams, 23 Ga. 222.

[2] Hemmings *v.* Gasson, 27 Law Jour. Rep. 252 (Q. B.); 1 El. B. & E. 346.

[3] Pearce *v.* Ornsby, 1 M. & Rob. 455; Mix *v.* Woodward, 12 Conn. 262; Williams *v.* Miner, 18 *Id.* 464; Symmons *v.* Blake, 1 M. & Rob. 477; Baldwin *v.* Soule, 6 Gray, 321; Shock *v.* McChesney, 2 Yeates, 473; Smith *v.* Wyman, 4 Shep. 13; Howard *v.* Sexton, 4 N. Y. 157; Kendall *v.* Stone, 2 Sandf. 269; Kennedy *v.* Gifford, 19 Wend. 296; Frazier *v.* McCloskey, 60 N. Y. 337; Miller *v.* Kerr, 2 McCord, 285; Pearce *v.* LeMaitre, 6 Sc. N. C. 607; 5 Man. & G. 700; Chubb *v.* Westley, 6 Car. & P. 436; Shrimper *v.* Heilman, 24 Iowa, 505; Robbins *v.* Fletcher, 101 Mass. 115; Ellis *v.* Lindley, 38 Iowa, 461; Hansbrough *v.* Stinnett, 25 Gratt. (Va.) 495; see Saunders *v.* Baxter, 6 Heisk. (Tenn.) 369; Rea *v.* Harrington,

action for words imputing perjury, the plaintiff was allowed, for the purpose of showing the *quo animo*, to give in evidence an indictment subsequently preferred by the defendant against him, and which was ignored.[1] But in an action of slander, for charging the plaintiff with stealing two beds, it was held not competent for the plaintiff, for the purpose of showing malice, to prove that the defendant subsequently entered a complaint against him, before a magistrate, for stealing a lot of wood and old iron; first, because the words used in the complaint did not relate to the charge which was the subject of the action; and secondly, because such using of the words was a proceeding in a court of justice, before a magistrate having jurisdiction of the supposed offense.[2]

§ 395. The plaintiff may, it seems, to prove malice, give evidence of defamatory publications by the defendant concerning him *after* the commencement of the action; but the authorities are conflicting.[3] In general, what occurs after the commencement of the action is inadmissible,[4] but where the words published led to the arrest of the plaintiff after the commencement of his action, it was held that the defendant might have excluded all evidence of what took place after the commencement of the action, but having consented to its admission, the jury were at liberty to take it into consideration.[5]

§ 396. Where evidence of another or other publica-

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58 Vt. 81; Gribble *v.* Pioneer Press Co. 34 Minn. 342.

[1] Tate *v.* Humphrey, 2 Camp. 73, note.

[2] Watson *v.* Moore, 2 Cush. 133.

[3] *Ante*, note 6, p. 650; Howell *v.* Cheatem, Cooke, 247; Scott *v.* Montsinger, 2 Blackf. 454; Teagle *v.* Deboy, 8 Blackf. 134; Warne *v.* Chadwell, 2 Stark. 457. Slanderous words (not actionable) spoken since the suit was commenced, are admissible in evidence to show the sense in which the words laid were spoken. (Carter *v.* M'Dowell, Wright, 100; and McDonald *v.* Murchison, 1 Dev. 7; *contra*, Lucas *v.* Nichols, 7 Jones Law [N. Car.], 32.) Or to show malice. (Sonneborn *v.* Bernstein, 49 Ala. 168.)

[4] Styles *v.* Fuller, 101 N. Y. 622.

[5] Goslin *v.* Corry, 8 Sc. N. S. 21; 7 Man. & G. 343; and see Harrison *v.* Pearce, 1 Fos. & Fin. 567; see § 390, *ante*.

tions than that declared upon is admitted for the purpose of showing malice only, the jury should be instructed that it is admitted for that purpose alone, and that they are not to give damages for other than the words charged in the declaration.[1] An instruction was given to the jury to the effect that a letter written by defendant and given in evidence by the plaintiff, was admissible only to show malice, and for no other purpose, and that they had a right to award such damages to plaintiffs as they thought them entitled to under all the circumstances proved in the case; held, that the caution to the jury in respect to the effect of the letter was not sufficient.[2]

§ 397. Evidence tending to make out an admission by the defendant, subsequently to the speaking of the words, of a dispute existing between him and the plaintiff before the speaking of the words, about a sum of money claimed to be due from the defendant to the plaintiff, is admissible to show express malice.[3] So to prove malice plaintiff may give evidence tending to show that defendant coveted the possession of plaintiff's land, and hoped by defaming him to compel him to remove;[4] but he cannot show that defendant had, by promises of reward and threats of vengeance, endeavored to prevent the attendance of witnesses for plaintiff.[5]

§ 398. In an action of slander for charging an infant with larceny, evidence of a previous quarrel between the defendant and the plaintiff's father and next friend, is in-

[1] Scott *v.* McKinnish, 15 Ala. 662; Barrett *v.* Long, 8 Ir. Law Rep. 331.

[2] Letton *v.* Young, 2 Metc. (Ky.) 558.

[3] Simpson *v.* Robinson, 18 Law Jour. Rep. 73, Q. B.; 13 Jur. 187. It being shown that defendant made a disparaging remark of plaintiff, defendant is entitled to show the circumstances which provoked such remark. (Hinman *v.* Hare, 5 N. Y. St. Rep. 505.)

[4] Morgan *v.* Livingston, 2 Rich. 573.

[5] Kirkaldie *v.* Paige, 17 Vt. 256; *contra*, see Cruikshank *v.* Gordon, 48 Hun, 308, held proof of an admission by defendant of speaking the alleged slander. Matter occurring two years before to show malice. (Harmon *v.* Harmon, 61 Maine, 233.)

admissible to prove malice in the defendant toward the plaintiff.[1] In an action against the *publisher* of the magazine in which the libel was published, evidence of personal malice of the editor against the plaintiff was held inadmissible.[2] So the refusal of the editor of a newspaper to publish a retraction of the libel was held not to be evidence of malice against the publisher of such newspaper.[3] On the trial of an action for a libel in a newspaper, it appeared that the defendant employed F. to print the newspaper in question, and that S., one of F.'s workmen, had *set up* the article in the absence of the defendant and of the editor of the paper; held that the plaintiff could not ask a witness if he heard S. express any ill-will towards the plaintiff.[4] In the same case, it was held that the plaintiff might give in evidence an article published in a subsequent number of the same newspaper, with the defendant's knowledge and consent, justifying the publication of the article complained of as libelous, though such article was not published until after the action was commenced.

§ 399. The language itself, whether oral or written, may be evidence of malice, and where the occasion renders the publication *prima facie* privileged, the jury may take the language into consideration to determine the intent with which the publication was made.[5] And expressions in excess of what the occasion warrants may be evidence of malice.[6]

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[1] York *v.* Pease, 2 Gray, 282.

[2] Robertson *v.* Wylde, 2 M. & Rob. 101.

[3] Edsall *v.* Brooks, 2 Robertson, 414; 33 How. Pr. R. 191; Ackerman *v.* Jones, 37 Superior Ct. Rep. (5 Jones & S.) 42; Bradley *v.* Cramer, 66 Wis. 297; but see Klewin *v.* Banman, 53 Wis. 244.

[4] Goodrich *v.* Stone, 11 Metc. 486.

[5] Wright *v.* Woodgate, 2 C, M. & R. 573; Tyrw. & G. 12; Gilpin *v.* Fowler, 9 Ex. 615; Cooke *v.* Wildes, 5 El. & Bl. 328; Jackson *v.* Hopperton, 16 Com. B. N. S. 829; Spill *v.* Maule, Law Rep. 4 Ex. 232; *ante*, § 288, and last clause of § 241; also Swadling *v.* Tarpley, in Appendix, *post*.

[6] *Ante*, § 244 *b*, and § 389; Kent *v.* Bongartz, 15 R. I. 22.

§ 400. Interposing a justification which the defendant either abandons or fails to prove, may be regarded as an aggravation of the original wrong, and may be taken into consideration by the jury in estimating damages.[1] It is evidence of malice,[2] and of continued malice.[3] In New York it has been supposed that since the Code of Procedure, the rule allowing mitigating circumstances has been changed, and a plea of justification on the ground of truth is not to be considered as an aggravation.[4] A justification on the ground of truth was held not to be an aggravation of the charge, where the defendant had reason to believe the charge to be true,[5] or where the plea of

[1] Fero *v.* Ruscoe, 4 N. Y. 162; Distin *v.* Rose, 69 N. Y. 122; Purk *v.* Catanich, 51 Cal. 420; Wilson *v.* Robinson, 14 Law Jour. Rep. 196, Q. B.; 9 Jurist, 726; Lea *v.* Robertson, 1 Stew. 138; Richardson *v.* Roberts, 23 Ga. 215; Pool *v.* Devers, 30 Ala. 672; Updegrove *v.* Zimmerman, 13 Penn. St. R. (1 Harris), 619; Gorman *v.* Sutton, 32 *Id.* 247; Doss *v.* Jones, 5 How. (6 Miss.) 158; Freeman *v.* Tinsley, 50 Ill. 497; Robinson *v.* Drummond, 24 Ala. 174; Beasley *v.* Meigs, 16 Ill. 139; Spencer *v.* McMasters, *Id.* 405; Smith *v.* Wyman, 4 Shep. 13; Faucett *v.* Booth, 31 Up. Can. Q. B. 263; *contra*, Murphy *v.* Stout, 1 Ind. 372; Shoulty *v.* Miller, *Id.* 544; Shank *v.* Case, 1 Carter (Ind.), 170; Millison *v.* Sutton, *Id.* 508; Starr *v.* Harrington, *Id.* 515; and see Swails *v.* Butcher, 2 Carter, 84; Sloan *v.* Petrie, 15 Ill. 425; Thomas *v.* Dunaway, 30 Ill. 373; Rayner *v.* Kinney, 14 Ohio, N. S. 283; Pallet *v.* Sargent, 36 New Hamp. 496; Cavanagh *v.* Austin, 42 Vt. 576; Ransone *v.* Christian, 49 Ga. 491; Decker *v.* Gaylord, 35 Hun, 584. And by statute in Massachusetts, Illinois, Michigan, Wisconsin and Iowa, a plea of truth is not an aggravation of damages.

The judge, in addressing the jury, commented upon the fact that the defendant had refused, at the trial, to make an apology and withdraw his justification, though he gave no evidence in support of it, as evidence of malice. Held no misdirection. (Simpson *v.* Robinson, 11 Law Times, 266; 18 Law Jour. Rep. 73, Q. B.; 13 Jur. 187; note 3, p. 658.) That the defendant procured evidence to prove the truth of his charges, and then declined to plead in justification, may be properly referred to the jury on the question of malice, though not on that of damages. (Bodwell *v.* Osgood, 3 Pick. 379.) The defendant endeavoring to obtain testimony of the truth of the alleged defamatory matter, is not of itself evidence of malice. (Ormsby *v.* Douglass, 37 N. Y. 482.) Nor is the fact of pleading a justification, of itself, evidence of malice. (Caulfield *v.* Whitworth, 18 Law Times, N. S. 527.) Efforts of defendant to have plaintiff indicted, may be shown to aggravate damages. (Harbison *v.* Shook, 41 Ill. 142.)

[2] Jackson *v.* Stetson, 15 Mass. 48; Alderman *v.* French, 1 Pick. 1.

[3] Wilson *v.* Nations, 5 Yerg. 211.

[4] Klinck *v.* Colby, 46 N. Y. 427; Hawver *v.* Hawver, 78 Ill. 412; but see Bennett *v.* Matthews, 64 Barb. 410; Distin *v.* Rose, 69 N. Y. 122; Cruikshank *v.* Gordon, 15 N. Y. St. Rep. 897; 48 Hun, 308.

[5] Cooper *v.* Young, 24 Week. Dig. 47; Aird *v.* Freeman's Jour. 10 Daly, 254; Ward *v.* Dick, 47 Conn. 304; Doe *v.* Doe, 32 Hun, 628; Byrket *v.*

truth was so defective that no judgment could have been entered upon it,[1] or where the plea was withdrawn before the trial.[2] Where in an action for libel defendant pleaded not guilty and a justification, he offered no proof of the justification, but gave evidence to show that the publication was made under circumstances rendering it a privileged communication; held, that the jury, in forming their opinion (upon the first issue, whether or not the communication was privileged), ought not to take into consideration the fact that the justification had been pleaded and abandoned.[3]

§ 401. In an action for a libel, the defendant, to justify a charge made by him against the plaintiff of unfairness and partiality as collector of the United States taxes, proved that the plaintiff had refused to receive bills of a certain bank in payment of a tax. To rebut this evidence, the plaintiff offered a letter of instructions to him from the commissioner of the revenue, designating the description of the bills which the plaintiff should receive. It was held that such evidence was admissible as negativing the charge of unfairness and partiality in the plaintiff's conduct.[4] It was in the same case held that the plaintiff could not repel a charge of partial and unjust conduct, in the exaction of commissions not authorized by law, by showing that such commissions were taken honestly, through a mistaken construction of the law.

Monohon, 7 Blackf. 83; and see Shoulty *v.* Miller, 1 (Carter) Ind. 544.

[1] Braden *v.* Walker, 8 Humph. 34.

[2] Gilmore *v.* Borders, 2 How. (3 Miss.) 824.

[3] Wilson *v.* Robinson, 7 Q. B. 68; 9 Jurist, 726; 14 Law Jour. N. S. 196, Q. B.

[4] Stow *v.* Converse, 3 Conn. 325. Plaintiff may rebut testimony in justification. (Murphy *v.* Dougherty, 10 Bradw. [Ill.] 214.) In action of libel accusing plaintiff of a criminal offense, plaintiff to rebut evidence of justification, offered record of his acquittal of the offense; held incompetent. (McBee *v.* Fulton, 47 Md. 403; and see Corbley *v.* Wilson, 71 Ill. 209.) Plaintiff in rebuttal may prove his reputation. (Downey *v.* Dillon, 52 Ind. 442.)

CHAPTER XVII.

EVIDENCE FOR DEFENDANT.

What evidence is admissible depends upon what plea or answer is interposed—What may be proved under the general issue—Evidence to support a justification—Plaintiff's reputation in issue—Inquiry limited to plaintiff's general reputation—And to his reputation prior to the publication complained of—Truth in mitigation—Conduct of plaintiff leading to belief in truth—Report or suspicion of plaintiff's guilt in mitigation—Plaintiff's standing and condition in society—Prior or subsequent declarations of defendant—Heat and passion—Previous publications by the plaintiff—Controversies between plaintiff and defendant prior to the publication—Mitigation—Circumstances not admissible in mitigation.

§ 402. What evidence the defendant may give depends upon what plea or answer he has interposed.[1] His proof

[1] We have already (p. 63, note 1, *ante*) referred to some decisions on the proof of intent; we here add some others. When defendant offers himself as a witness he may be examined by plaintiff as to his *intent* (Com'wealth *v.* Damon, 17 The Reporter, 559 [Mass.]), and he may on his own behalf testify as to his *intent.* (Cowell *v.* Day, 18 Week. Dig. 97; Scranton *v.* Chase, 4 Law Times Rep. N. S. 17 [Pa.]; *contra*, Barr *v.* Hack, 46 Iowa, 308.) In Smith *v.* Higgins (82 Mass. [16 Gray], 251), it is said: In slander the good faith of the defendant and the feelings which prompted him to speak the words alleged in the declaration, being properly in issue, he is competent to testify concerning them. The testimony of the defendant concerning his motive in speaking the words, his belief in their truth, and the absence of ill-will or malice toward the plaintiff is admissible. (And to the like effect, see Wilson *v.* Noonan, 35 Wis. 321; McKown *v.* Hunter, 30 N. Y. 628; Turner *v.* O'Brien, 5 Neb. 542; and see The People *v.* Moore, 37 Hun, 84.) In White *v.* Tyrrell (5 Ir. C. L. R. 477), the defendant having written a letter, was permitted to be asked the question whether in writing the letter he had the intention of provoking a challenge. In Dillon *v.* Anderson (43 N. Y. 236), the action was on contract, defense, that contract was made jointly with H., who was not made a party. The contract was in writing and signed by defendant. H. was

must correspond with his plea. Under the common-law system of pleading and procedure, many matters of defense

named in the body of the paper as a contracting party, but it was not signed by him; on the trial, the defendant was called as a witness on his own behalf, and asked by his counsel, "Did you intend to make an individual contract?" The question was disallowed, and held in the Court of Appeals: "The testimony called for was not proper. There are authorities that a witness may be asked his motive or intent in doing an act. . . . We think that they hold no more than this; that where the doing the act is not disputed, but is affirmed, and whether the act shall be valid or invalid hangs upon the intent with which it was done, which intent from its nature would be formed and held without avowal, then he upon whom the intent is charged may testify whether he secretly held such intent when he did the act. Thus an insolvent assignor in trust, charged with the fraudulent intent to hinder and delay creditors, may be called in support of the deed of trust, and may say whether, when he made it, he had no fraudulent purpose; and one sued for a malicious prosecution may testify that in setttng on foot the legal proceedings he believed that there was cause for them. And as an extreme case which we are not willing to extend, one against whom the defense of usury has been set up, has been permitted to testify what was the intention in stipulating for a sum reserved out of the face of a note. But that an act should be held to have or not to have effect, and one party to it to be bound or not, as the other party to it should, by his undisclosed purpose, have determined, is warranted by no sound principle." In Robbins *v.* Fletcher (101 Mass. 115), an action of slander for accusing plaintiff of fornication, defendant having denied, in his testimony in chief, that he spoke the words alleged, or that he had any ill-will toward the plaintiff, may be asked on cross-examination whether he did not, before the time when it was contended that he uttered the words sued on, have a hostile feeling toward a person whom there is evidence that he spoke of as the other party to the offense. And where the defendant testified to having no ill-will towards plaintiff, it was held he might be asked on cross-examination, whether he had not brought suits against the plaintiff, but he cannot be asked, what were the subject-matters of those suits. (Boynton *v.* Boynton, 43 How. Pr. R. 380.) In an action for malicious prosecution, defendant's counsel proposed to ask defendant whether, in procuring the warrant, he acted without malice. The question was disallowed, and, by the court, "It was for the jury to say whether the defendant acted maliciously, and to allow the question would be substituting the witness in place of the jury to determine one of the most important questions in the cause." (Lawyer *v.* Loomis, 3 Sup. Ct. Rep. [T. & C.] 396.) That case was overruled. (McCormick *v.* Woodworth, 47 Hun, 71.) In an action against defendant as superintendent of the poor, to recover for maintenance of a pauper alleged to have been improperly removed by him, *with intent* that the pauper should become chargeable to another county, held defendant might be asked, Did you send the pauper from the county of H. in good faith? (Cortland Co. *v.* Herkimer Co. 44 N. Y. 22.) It was held not proper to ask a witness, What would you have done with the proceeds if you had effected a sale? (Cowdrey *v.* Coit, 44 N. Y. 391.) Held not proper to ask a witness what was his intent in taking more than seven per cent. interest. (Fiedler *v.* Darrin, 50 N. Y. 443, 444.) And in a prosecution for seduction, held not proper to ask the woman, "Would you have consented to it (the intercourse) without a promise?" (Cook *v.* The People, 2 Sup. Ct. Rep. [T. & C.] 404.) A question to witness, "In signing indorsement, did you intend to adopt the seals of the obligors?" not allowed. (Brown *v.* Champlin, 3 N. Y. Weekly Dig. 189.) In an

might be given in evidence under the general issue which now require to be specially pleaded. So, too, under the common-law system, mitigating circumstances could not be pleaded, but were admitted in evidence under the general issue; and this is still the rule where there is not any statutory provision on the subject. In New York and some other States, provision is made by statute allowing the defendant, in actions for slander and libel, to set forth in his answer the mitigating circumstances he will prove upon the trial. Some of the effects of these statutory provisions have already been referred to under the head of Pleading; other effects will be noticed hereafter.

§ 403. Under the general issue the defendant was at liberty to prove anything which destroyed the plaintiff's cause of action.[1] He might disprove the fact of publication, or show that the matter published was not of an injurious character, or that the publication was privileged,[2]

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action for slander, defendant was not allowed to be asked whether, in making the publication, he had any thought of injuring plaintiff. (Harwood *v.* Keech, 6 Sup. Ct. Rep. [T. & C.] 665; 4 Hun, 391.) On a trial for an assault with an axe, it was held proper to ask the prisoner what was his "intention in taking the axe from the shed to the house." (Kerrains *v.* The People, 60 N. Y. 221.) One person cannot testify as to the *intent* of another. (Manuf. B'k *v.* Koch, 8 Cent. Rep. 672; 36 Alb. L. J. 34.)

[1] Barker *v.* Dixon, 1 Wils. 45; and see O'Donoghue *v.* McGovern, 23 Wend. 26. Where the words clearly impute a felony, if defendant does not justify, he cannot show that the words related to an act which might have been innocent. (Laine *v.* Wells, 7 Wend. 175.) In New York, the defendant may examine plaintiff as a witness before the trial, and if, on such examination, plaintiff refuses to answer a proper question, his complaint may be struck out. (Richards *v.* Judd, 15 Abb. Pr. Rep. N. S. 184; 2 Sup. Ct. Rep. [T. & C.] 479; Funk *v.* Tribune Asso. 2 City Ct. Rep. 43.) In Maryland, by statute, truth may be given in evidence under the general issue. (See Richardson *v.* The State, 66 Md. 205; *ante*, note 3, p. 496.)

[2] O'Brien *v.* Clement, 15 Law Jour. Rep. 285, Ex.; 3 D. & L. 676. Where the defense is privileged communication, it need not be specially pleaded. (Lillie *v.* Price, 1 Nev. & P. 16; 5 Dowl. 432; Richards *v.* Boulton, 4 Up. Can. Q. B. Rep. O. S. 95; Abrams *v.* Smith, 8 Blackf. 95; Stannus *v.* Finlay, Ir. Rep. 8 Com. Law, 264.) But it may be specially pleaded (Dunn *v.* Winters, 2 Humph. 512), and it seems it must be pleaded in Massachusetts. (Goodwin *v.* Daniels, 7 Allen [Mass.], 61.) In New York, it must be pleaded. In England, in actions of slander of plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to plaintiff's

as being a fair comment on a matter of public concern;[1] any circumstances which tended to disprove malice;[2] or that plaintiff procured the publication with a view to an action;[3] and where the libel consisted of a report of proceedings the publication of which was not privileged, it was held that it might be shown under the general issue and in mitigation that the report, although not correct, was an honest one, and intended to be a fair account of the transaction referred to.[4] The general issue put in issue the malice in making the publication,[5] and amounted to a denial of the special damage,[6] and the general good reputation of the plaintiff (§ 406), but it admitted the induce-

office, profession, or trade; but it will not operate as a denial of the fact of plaintiff holding the office, or being in the profession or trade alleged. (Reg. Gen. H. T. 4 Will. 4; 2 C. & M. 23; 10 Bing. 477; 3 Nev. & M. 9; 5 B. & Adol. 9.) All matters in confession and avoidance shall be specially pleaded. (*Ib.*)

[1] Lucan *v.* Smith, 20 Jur. 1170; 38 Eng. Law & Eq. Rep. 395.

[2] Weaver *v.* Hendrick, 30 Mo. (9 Jones), 502; Smith *v.* Smith, 39 Penn. St. R. 441; Sims *v.* Kinder, 1 Carr. & P. 279; Van Derveer *v.* Sutphin, 5 Ohio St. 293; Swift *v.* Dickerman, 31 Conn. 285; Williams *v.* Miner, 18 Conn. 464; Thomas *v.* Dunaway, 30 Ill. 373; Brunswick *v.* Pepper, 2 C. & K. 683; Remington *v.* Congdon, 2 Pick. 310; Gilman *v.* Lowell, 8 Wend. 573. And in New York under a general denial and a proper statement in the answer, any circumstance to disprove malice may be shown, although it tended to prove the truth of the charge. (Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 N. Y. 67; Dolevin *v.* Wilder, 34 How. Pr. Rep. 488; Chapman *v.* Calder, 14 Pa. St. 365; Neeb *v.* Hope, 111 Penn. St. Rep. 145.) Where there is any, the slightest doubt in the mind of the judge as to whether the facts set up in mitigation tend to disprove malice, he should permit them to be proved, and submit the question of malice to the jury. (*Id.*)

[3] See *ante*, note 3, p. 96. In an action for slander, plea the general issue. *Held*, proper to refuse to charge "that if defendant did no more than repeat a report which originated from plaintiff's levity and carelessness, the plaintiff could not recover." (Fitzgerald *v.* Steward, 53 Penn. 343; see apparently *contra*, Shirley *v.* Keathy, 4 Coldw. [Tenn.] 29.) Plaintiff's motive in bringing the action is immaterial to the issue on a plea of justification. (Bradley *v.* Kennedy, 2 G. Greene [Iowa], 231.)

[4] Smith *v.* Scott, 2 Car. & K. 580; and see East *v.* Chapman, Mo. & Malk. 46; Charlton *v.* Watton, 6 C. & P. 385.

[5] Keegan *v.* Robson, 6 Up. Can. Q. B. 375.

[6] Wilby *v.* Elston, 8 C. B. 142. A traverse of special damage held unnecessary and improper. (Smith *v.* Thomas, 2 Bing. N. C. 372; see Perring *v.* Harris, 2 Moo. & Rob. 5; Custis *v.* Sandford, 4 Ir. C. L. 197.) The complaint usually alleges that plaintiff has sustained damages to a certain amount. This we suppose is not admitted if not denied. It was held otherwise (Goodyear Dental Comp. *v.* White, 8 The Reporter, 423; U. S. Circuit Co't, N. Y. Aug't, 1879), but defendant was allowed to amend his answer by inserting a denial.

ment[1] and the falsity of the charge.[2] The defenses of accord and satisfaction (§ 250), former recovery (§ 251), truth (§§ 354, 409), and illegality of plaintiff's occupation,[3] must be specially pleaded to enable the defendant to give evidence of them on the trial.[4]

§ 404. As to a justification, it is held that, in an action for slander or libel, the burden of proof is upon the defendant.[5] The charge complained of being the commission of a criminal offense, the same degree of evidence is necessary to sustain a plea of justification as would be necessary to convict the plaintiff in a criminal prosecution for the same offense.[6] At least the defendant must prove the crime charged to the satisfaction of the jury,[7] and beyond a reasonable doubt.[8] The plea must be substantially proved,[9] or

[1] Fradley *v.* Fradley, 8 C. & P. 572; Heming *v.* Power, 10 M. & W. 564; Gwynne *v.* Sharpe, 1 C. & Mar. 533.

[2] Sheahan *v.* Collins, 20 Ill. 325.

[3] Fry *v.* Bennett, 28 N. Y. 324; Trimmer *v.* Hiscock, 27 Hun, 364; § 183, *ante*.

[4] Libel charged an Englishman with having forsworn his allegiance by enlisting in the American army; plea of justification. Held, that plaintiff's admission that he enlisted in the American army was evidence to prove the justification. (Hill *v.* Hogg, 4 All. [N. B.] 108.) Where the owner of a race horse brought action for a libel charging him with having caused the horse to be pulled in a race, and the answer was not guilty, and justification, it seems that evidence of the shouts of the spectators is admissible. (Walker *v.* George, 5 A. J. R. 29.)

[5] Stith *v.* Fullenwieder, 19 Pac. Rep. 314 (Kansas); Ransom *v.* Christian, 56 Ga. 351; Gall *v.* Fleming, 10 Ind. 253; Fry *v.* Bennett, 28 N. Y. 324.

[6] Landis *v.* Shanklin, 1 Carter (Ind.), 92; Shoulty *v.* Miller, *Id.* 554; Gants *v.* Vinard, *Id.* 476; Newbit *v.* Statuck, 35 Maine (5 Red.), 315; Dwinells *v.* Aikin, 2 Tyler, 75; Seely *v.* Blair, Wright, 683; Steinman *v.* McWilliams, 6 Barr, 170; Willmett *v.* Harmer, 8 C. & P. 695; Swails *v.* Butcher, 2 Carter (Ind.), 84; Woodbeck *v.* Keller, 6 Cow. 118; Forshee *v.* Abrams, 2 Clarke (Iowa), 571; Merk *v.* Gelhauser, 50 Cal. 631; Riley *v.* Norton, 65 Iowa, 356; *contra*, Barfield *v.* Britt, 2 Jones L. (N. Car.) 41; Gorman *v.* Sutton, 32 Penn. 247; Lanter *v.* McEwen, 8 Blackf. 495; Wonderly *v.* Nokes, 8 Blackf. 589; Folsom *v.* Brawn, 5 Foster (25 N. Hamp.), 114; Kincade *v.* Bradshaw, 3 Hawks, 63.

[7] Offutt *v.* Earlywine, 4 Blackf. 460. Evidence of plaintiff's being suspected is not sufficient. (Commons *v.* Walters, 1 Porter, 323; Knight *v.* Foster, 39 N. H. 576.)

[8] Shoulty *v.* Miller, 1 Carter (Ind.), 554; Tucker *v.* Call, 45 Ind. 31; Merk *v.* Gelzhaeuser, 50 Cal. 631; Bell *v.* McGinness, 40 Ohio St. 204; Kidd *v.* Fleek, 47 Wis. 443; McBee *v.* Fulton, 47 Md. 403; Riley *v.* Norton, 65 Iowa, 356 (overruling Bradly *v.* Kennedy, 2 G. Gr. 231; Forshee *v.* Abrams, 2 Iowa, 571: Fountain *v.* West, 23 Iowa, 9; Ellis *v.* Lindly, 38 owa, 461); Georgia *v.* Kipford, 45 Iowa, 533; Mott *v.* Dawson, 46 Iowa, 533; McGregor *v.* Eakin, 3 Bradw. (Ill.) 340; The People *v.* Briggs, 114 N. Y. 65.

[9] Napier *v.* Daniell, 3 Sc. 417; 2

the plaintiff is entitled to recover.[1] Where the charge is crime, a conviction of the plaintiff of the crime is, in general, admissible to sustain a justification, but it is only *prima facie* evidence and must be excluded if the defendant was a witness in the criminal prosecution.[2] A plea of justification of libel, that the plaintiff had been guilty of bigamy, requires as strong proof as on an indictment for that offense; but a plea justifying a charge of polygamy, held sustained by proof of actual marriage in two instances, and of cohabitation and reputation as to a third.[3] To sustain a plea of justification of a charge of perjury, the testimony of two witnesses at least, or of one witness and strong corroborating circumstances, are necessary.[4] And the defendant must prove not only that the plaintiff's testimony was false, but that it was willfully and corruptly false.[5] The corrupt intent, however, is inferable from the falsity of the testimony.[6] To establish the justification, the testimony which the plaintiff gave on the trial when the alleged perjury was committed, may be received as evidence to be considered by the jury.[7] Under an

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Hodges; 187; 3 Bing. N. C. 77; Forrest *v.* Hanson, 1 Cr. C. C. 63. Proof of adultery. (Ellis *v.* Buzzell, 60 Me. 209; Edwards *v.* Knapp, 10 So. West. Rep. 54.

[1] Kincade *v.* Bradshaw, 3 Hawks, 63.

[2] Maybee *v.* Avery, 18 Johns. 352. This was at the time when parties could not be witnesses in their own behalf in civil actions. Where they can be such witnesses probably the exception stated in the text does not apply.

[3] Willmett *v.* Harmer, 8 C. & P. 695.

[4] Bradley *v.* Kennedy, 2 G. Greene (Iowa), 231; Steinman *v.* McWilliams, 6 Barr, 170; Byrket *v.* Monohon, 7 Blackf. 83; Woodbeck *v.* Keller, 6 Cow. 118; Newbit *v.* Statuck, 35 Maine (5 Red.), 315: Dwinells *v.* Aikin, 2 Tyler, 75; Ransone *v.* Christian, 49 Ga. 491. This rule was somewhat qualified in Kincade *v.* Bradshaw, 3 Hawks, 63; Spruil *v.* Cooper, 16 Ala. 791; see 3 Phillips' Ev. Cowen & Hill's and Edwards' notes, tit. in Index, Slander. Where the accusation was perjury, to charge that the jury should find for defendant if the testimony was false, or for plaintiff unless the evidence before them was sufficient to convict him of perjury, is error. (Sloan *v.* Gilbert, 12 Bush [Ky.], 51.)

[5] M'Kinly *v.* Rob, 20 Johns. 351. That is to say, he must prove technical perjury. (Hicks *v.* Rising, 24 Ill. 566; McGlemary *v.* Keller, 3 Blackf. 488; Gorton *v.* Keeler, 51 Barb. 475; Sloan *v.* Gilbert, 12 Bush [Ky.], 51; *contra*, Wood *v.* Southwick, 97 Mass. 354.)

[6] Hopkins *v.* Smith, 3 Barb. 599.

[7] Newbit *v.* Statuck, 35 Me. (5 Red.) 315; Arrington *v.* Jones, 9 Port. 139; see Milner *v.* Gilbert, 3 Kerr, 617. In an action of slander, for

allegation in the libel that the defendant had crushed the Hygeist system of wholesale poisoning, and that several vendors had been convicted of manslaughter—held that it was not necessary for the defendant to prove that the system had been entirely crushed, and that proof of the conviction of two vendors for manslaughter sufficiently proved the plea, although the evidence as to the death being occasioned by not complying with the printed regulations in some respects varied from the allegation, there being evidence for the jury as to the cause of death.[1] The admissions of the plaintiff are evidence in support of a defense of justification on the ground of truth.[2]

§ 405. Where the words laid charge the plaintiff with having committed a certain offense, evidence will not be received that he committed a different offense, either with the same or with other persons.[3] As where the plaintiff was charged with adultery with J. S., it was held that proof

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charging the plafntiff with perjury in a judicial proceeding, the defendant, on the plea of "not guilty," may, in mitigation of damages, prove what were the words sworn by the plaintiff. (Grant *v.* Hover, 6 Munf. 13.)

[1] Morrison *v.* Harmer, 3 Bing. N. C. 759; 4 Scott, 524. Defendant is not held to prove the exact truth of his statements, and the soundness of his inferences, provided that he is not actuated by express malice, and that there is reasonable ground for such statements and inferences. (Crane *v.* Waters, 10 Fed. R. 619 [Mass.].) Where the words were, "The editor of the *Chronicle* has been intoxicated on several occasions," held, defendant might prove by witnesses that they had seen the prosecutor "acting as though he was intoxicated." (State *v.* Mayberry, 33 Kans. 441.)

[2] Hill *v.* Hogg, 4 Allen (N. Brunswick), 108; Bullard *v.* Lambert, 40 Ala. 204. Defendant's statements tending to show the truth of the alleged libel are admissible. (Boun *v.* Seideker, 38 Iowa, 418.)

[3] Pallet *v.* Sargent, 36 N. H. 496; Sharpe *v.* Stephenson, 12 Ired. 348; Barthelemy *v.* The People, 2 Hill, 257; Gregory *v.* Atkins, 42 Vt. 237. Under a plea of justification for charging plaintiff with fornication with a certain man, evidence that her child is a bastard is not sufficient. (Richardson *v.* Roberts, 23 Ga. 215.) Where the words charged the stealing of D.'s hay, and the defendant offered evidence to prove that the hay, the subject of the theft so charged, was the joint property of the plaintiff and D., so that in legal effect no such crime was or could have been committed, it was held that as the charge was unequivocally a charge of theft, so intended and so received, the evidence offered by the defendant was inadmissible. (Williams *v.* Miner, 18 Conn. 464; *ante*, § 212.)

of adultery with others than J. S. could not be received.[1] Where the plaintiff was charged with keeping a house of ill-fame, it was held that evidence of unchaste and lascivious conduct of the plaintiff's family, not establishing the offense, was inadmissible for any purpose.[2] And where the charge was of perjury on a certain occasion, held that defendant could not justify by proof of perjury on any other occasion than that alleged.[3] To a charge that plaintiff had had connection with a mare, innuendo been guilty of the crime against nature with a beast, defendant gave notice that he would prove on the trial that plaintiff had had connection with a *cow*, and on the trial offered to prove the allegation in his notice, the court refused to receive it, either in bar or in mitigation, on the ground that it was not a justification of the specific charge laid, but of another charge distinct as to the subject-matter.[4] A libel charging hardness towards the poor, dissoluteness of morals, and habits of vice and calumny, as conclusions deducible from particular instances enumerated and arranged in it, cannot be supported by proof of other instances of conduct not detailed or alluded to in it.[5]

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[1] Matthews *v.* Davis. 4 Bibb, 173. and see Watters *v.* Smoot, 11 Ired; 315; Fisher *v.* Tice, 20 Iowa, 479.

[2] Bush *v.* Prosser, 13 Barb. 221. On trial for words imputing unchastity to plaintiff, it is not permissible, under a plea of not guilty, to prove that the house in which the plaintiff resided was a house of ill-fame. (Hackett *v.* Brown, 2 Heiskell [Tenn.], 264.)

[3] Aldrich *v.* Brown, 11 Wend. 596; Whittaker *v.* Carter, 4 Ired. 461. But where the charge was larceny, held that defendant might offer evidence to prove a particular larceny of the same description as that charged. (Adams *v.* Ward, 1 Stew. 42.)

[4] Andrews *v.* Vanduzer, 11 Johns. 38.

[5] Barthelemy *v.* The People, 2 Hill, 248; Hatfield *v.* Lasher, 17 Hun, 23. In an action for accusing plaintiff of buying and selling by unsealed weights and measures, and also of the crime of gross fraud and cheating at common law, a justification on the ground that the charge was true cannot be supported by evidence that plaintiff "applied to a person to take some damaged meat and sell it, without letting it be known that plaintiff was concerned in the transaction." (Chapman *v.* Ordway, 87 Mass. [5 Allen], 593.) Where the charge was: "The investigations are not yet ended, but the chief owners believe they have been outrageously swindled." Proof that the chief owners *believed* they had been outrageously swindled was rejected. It was neither justification nor mitigation. To justify, defendant should prove the truth of the allegation, not the *belief* of the publisher or his informant. (Wilson *v.* Fitch, 41

§ 406. The plea of not guilty put in issue the general character (reputation)[1] of the plaintiff, and therefore upon a plea of not guilty only, the defendant might give in evidence in mitigation the general bad character (reputation) of the plaintiff *before and at the time* of the publication complained of.[2] "Certainly a person of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence."[3] This principle, so much discussed at an early day, and for a time left unsettled, has since been so well established by authority as not now to be open for discussion;[4] and such

Cal. 363.) In slander for calling a clergyman a thief, defendant, under plea of not guilty, was allowed to ask a witness "what is the general character of plaintiff as to being a thief?" (Drown *v.* Allen, 91 Penn. St. 393; and see Warner *v.* Lockerby, 31 Minn. 421.)

[1] As to the difference between reputation and character, see *ante*, note, p. 24.

[2] Smith *v.* Ottendorfer, 3 N. Y. St. Rep. 187; Woods *v.* Anderson, 5 Blatchf. (Ind.) 589. A suit for words actionable *per se*, cannot be defeated entirely by proof of plaintiff's bad character. (Langton *v.* Hagerty, 35 Wis. 150; Maxwell *v.* Kennedy, 50 Wis. 645; Wood *v.* Durham, 21 Q. B. D. 501; *contra*, Anon. 6 How, Pr. R. 160.)

[3] Ld. Ellenborough, in —— *v.* Moore, 1 M. & S. 284. In Bracegirdle *v.* Bailey (1 Fost. & F. 536), there was no plea of justification; plaintiff was put on the witness stand, but not examined in chief—held that defendant could not, to mitigate damages, put questions to plaintiff tending to discredit him, nor which went to show his bad character. Evidence of plaintiff's reputation may be received without any other plea than a general denial. (Bennett *v.* Matthews, 64 Barb. 410.) Not error to charge that if plaintiff's reputation bad, his compensation should be measured by the injury actually suffered, and held this was equivalent to a direction to find nominal damages. (Plummer *v.* Johnson, 70 Wis. 131.) The jury gave $500 damages; held not excessive. (*Id.*)

[4] Jewett, J., Hamer *v.* McFarlin, 4 Denio, 509; citing Foot *v.* Tracy, 1 Johns. 46; Springstein *v.* Field, Anthon, 252; Paddock *v.* Salisbury, 2 Cow. 811; Douglass *v.* Tousey, 2 Wend. 352; Root *v.* King, 7 Cow. 613; S. C. in error, 4 Wend. 113; Richardson *v.* Northrup, 56 Barb. 105; and see Gilman *v.* Lowell, 8 Wend. 573; Scott *v.* McKinnish, 15 Ala. 662; Pope *v.* Welsh, Adm. 18 Ala. 631; Fuller *v.* Dean, 31 Ala. 654; Anthony *v.* Stephens, 1 Mo. 254; Bryan *v.* Gurr, 27 Ga. 378; Eastland *v.* Caldwell, 2 Bibb. 21; Bowdish *v.* Peckham, 1 D. Chip. 144; Bridgman *v.* Hopkins, 34 Vt. 532; Lamos *v.* Snell, 6 New Hamp. 413; Sawyer *v.* Eifert, 2 Nott & McC. 511; Seymour *v.* Merrills, 1 Root, 459; Vick *v.* Whitfield, 2 Hay. (N. Car.) 222; De Wit *v.* Greenfield, 5 Ham. (Ohio), 225; Brunson *v.* Lynde, 1 Root, 354; Wolcott *v.* Hall, 6 Mass. 514; Clark *v.* Brown, 116 Mass. 504; Whitney *v.* Janesville Gazette, 5 Bissell, 330; Alderman *v.* French, 1 Pick. 1; Parkhurst *v.* Ketchum, 6 Allen, 406; Buford *v.* McLuny, 1 Nott & McC. 268; Henry *v.* Norwood, 4 Watts, 347; Young *v.* Bennett, 4 Scam. 43; Sanders *v.* Johnson, 6

evidence was also admissible where the defendant, in addition to not guilty, put in a plea of justification, and gave evidence to support it, but failed to establish it.[1] Whether in New York such evidence would be admissible under a general denial, and without any circumstances in mitigation set up in the answer, does not appear to have been decided in any reported case. In our opinion, to entitle a defendant in the courts of New York to question the general character of the plaintiff, he should state in his answer his intention to give such evidence on the trial.[2]

§ 407. When an inquiry into the reputation of the plaintiff is permissible, it is his general reputation taken as a whole, and not his reputation as to any particular act

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Blackf. 50; McCabe *v.* Platter, 6 Blackf. 405; Burke *v.* Miller, 6 Blackf. 155; Steinman *v.* McWilliams, 6 Barr, 170; McNutt *v.* Young, 8 Leigh, 542; Stone *v.* Varney, 7 Metc. 86; Bowen *v.* Hall, 20 Vt. 232; Sheahan *v.* Collins, 20 Ill. 325; Hanners *v.* McClelland, 76 Iowa, 318; Bell *v.* Parke, 10 Ir. Law Rep. N. S. 279.

As to the rule in England, see Jones *v.* Stevens (11 Price, 235), where it is said it is not competent to a defendant to plead a justification, as of plaintiff's general bad character, in general and indefinite terms, but he is bound to state facts specially to give the plaintiff an opportunity of denying them; such pleas are demurrable, and it is an abuse of the court to put them on record; neither can he any more be permitted to give particular or general evidence of that nature in mitigation of damages, than to plead it in bar of the action. (See Morris *v.* Langdale, 2 B. & P. 284.) Evidence of general bad reputation of plaintiff was rejected, there being no plea of justification. (Edgar *v.* Newell, 24 Up. Can. Q. B. Rep. 215; Myers *v.* Currie, 22 *Id.* 470.) In an action for slander for charging plaintiff, a female, with want of chastity, the judge directed the jury "that if they should find that plaintiff had so destroyed her character by her own lewd and dissolute conduct as to have sustained no injury from the words spoken, they might give only nominal damages." (Flint *v.* Clark, 13 Conn. 361; and see Conroe *v.* Conroe, 47 Penn. St. R. 198.) If plaintiff gives evidence of his reputation, defendant may give counter evidence. (Mitchell *v.* Kerr, Rowe's Rep. 537.)

[1] Hamer *v.* McFarlin, 4 Denio, 509. It was held otherwise in Jackson *v.* Stetson (15 Mass. 48), and that case was followed in Alderman *v.* French (1 Pick. 1). But Jackson *v.* Stetson was questioned in Cilley *v.* Jenness (2 New Hamp. 89); Whitaker *v.* Freeman (1 Dev. 280). (And see Stone *v.* Varney, 7 Metc. 86; 2 Stark. Ev. 878; and the cases cited in the last preceding note.) Where there is no impeachment of plaintiff's reputation, the jury, in assessing damages, are not to consider such reputation as otherwise than good. (Padgett *v.* Sweeting, 55 Md. 404.)

[2] Anon. 8 How. Pr. Rep. 434; and see Stiles *v.* Comstock, 9 *Id.* 48; Howe Machine Co. *v.* Souder, 58 Ga. 64; Stanley *v.* Webb, 21 Barb. 148.

or in any particular transaction, that is to be inquired of;[1] and, therefore, evidence cannot be given of his guilt of any specific act of misconduct;[2] as that he had been guilty of false swearing.[3] Where the charge was that the plaintiff, a physician, had no professional knowledge or skill, and lost almost all his patients, it was held that proof of particular instances in which the plaintiff had shown want of knowledge and skill, for the purpose of mitigating damages, was inadmissible.[4] And although it has been said that when a defendant may give evidence of the general bad reputation of the plaintiff, he is not confined to the subject-matter of the defamation complained of,[5] yet in an action for charging the plaintiff with perjury, it was held erroneous to admit evidence of his general bad character for truth.[6]

[1] Hatfield *v.* Lasher, 81 N. Y. 249; Steinman *v.* McWilliams, 6 Barr, 170; Shilling *v.* Carson, 27 Md. 175; Wright *v.* Shroeder, 2 Curt. 547; Fitzgerald *v.* Stewart, 53 Penn. 343; Lambert *v.* Pharis, 3 Head (Tenn.), 622; Fountain *v.* West, 23 Iowa, 9; Pollard *v.* Lyon, 91 U. S. 225; Brooks *v.* Dutcher, 22 Neb. 644; see Wood *v.* Earl Durham, 21 Q. B. D. 501; Scott *v.* Sampson, 8 Q. B. D. 491.

[2] Andrews *v.* Van Deuser, 11 Johns. 38; Vick *v.* Whitfield, 2 Hay. (N. Car.) 222; Dewit *v.* Greenfield, 5 Ham. (Ohio), 225; Lamos *v.* Snell, 6 New Hamp. 413; Sawyer *v.* Eifert, 2 Nott & McC. 511; Burke *v.* Miller, 6 Blackf. 155; Freeman *v.* Price, 2 Bailey, 115; Ridley *v.* Perry, 4 Shep. 21; Matthews *v.* Davis, 4 Bibb, 173; Brown *v.* Hall, 20 Vt. 232; Parkhurst *v.* Ketchum, 6 Allen, 406.

[3] Luther *v.* Skeen, 8 Jones Law (N. Car.), 356; or lewdness (Smith *v.* Cook, 1 Alb. L. J. 162).

[4] Swift *v.* Dickerman, 31 Conn. 285. And such evidence would not be admissible for the purpose of showing the professional reputation of plaintiff, as reputation can only be proved by the direct testimony of those who are acquainted with it, and not by particular facts. (*Id.*)

[5] Sayre *v.* Sayre, 1 Dutcher, 235; Lamos *v.* Snell, 6 New Hamp. 413; Sawyer *v.* Eifert, 2 Nott & McC. 511; see, however, Wright *v.* Shroeder, 2 Curtis C. C. 548. The inquiry should be confined to the plaintiff's general character for integrity and moral worth, or to conduct similar in character to that with which he was charged by the defendant. (Leonard *v.* Allen, 11 Cush. 241.)

[6] Steinman *v.* McWilliams, 6 Barr, 170. In an action for charging the plaintiff with perjury, the plaintiff proved the speaking of the words charged, and then asked the witness what was plaintiff's general character, when on oath and when not on oath, as a man of truth. The witness answered the question favorably to the plaintiff. Defendant's counsel then, in cross-examining the witness, asked him what was the plaintiff's general moral character, and the plaintiff objected to the question. Held, that the question ought to be answered, because it was on cross-examination, and because the answer might furnish evidence in mitigation of damages. (Lincoln *v.* Chrisman, 10 Leigh, 338.) A witness as to plaintiff's good character may be asked upon cross-examination, whether he had heard of plaintiff being intimate with other

And where the charge as proven was of burning a jail and murdering a man in it, but there was some evidence that it was only of aiding an escape from the jail, held, that the evidence that the defendant was reputed guilty of the latter offense, was inadmissible for any purpose.[1] The defendant imputed to the plaintiff, who was a clergyman, these words: "Mr. S. said the blood of Christ had nothing to do with our salvation, more than the blood of a hog." Held, that testimony tending to prove that the plaintiff denied the divinity of Christ and the doctrine of his atonement, and said he was a created being, a good man and perfect, his death that of a martyr, but that there was no more virtue in his blood than that of any creature, was not admissible, either in justification or mitigation.[2] In an action of slander for having called the plaintiff a thief, and saying that "he had stolen his (defendant's) spar," the defendant, in mitigation of damages, offered in evidence the record of a verdict and judgment in his favor against A., for having taken maliciously, and converted it to his own use, the spar in question, it was held that such evidence was inadmissible.[3] And where the charge was that the plaintiff was a thief, and had stolen the defendant's corn, and the defendant justified, held that evidence that the parties were tenants in common of some corn, and that the defendant had taken secretly, unfairly, and dishonestly, more than his share, was not admissible either in justification or mitigation. Mistake, to mitigate, must be mistake of fact and not of law.[4]

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men's wives, as tending to show that his reputation was not good. (Calkins *v.* Colburn, 27 Weekly Dig. 310.)

[1] Cole *v.* Perry, 8 Cow. 214.

[2] Skinner *v.* Grant, 12 Vt. 456.

[3] Watson *v.* Churchill, 5 Day, 256.

[4] Bisbey *v.* Shaw, 15 Barb. 578. Where a minister in his sermon recited a story out of Fox's Martyrology that one Greenwood, being a perjured person, &c., had great plagues sent upon him, and was killed by the hand of God, whereas Greenwood was alive and present at the sermon. He sued for the slander, but it was adjudged against him because the matter was recited as history. (Greenwood *v.* Prick, Cro. Jac. 91; cited 1 Camp. 270.) Said not to be law. (Hearne *v.* Stowell, 12 Adol. & El. 726.)

§ 408. The rule in relation to proof of the character of the plaintiff is, that the inquiry must be made as to his general reputation[1] where he is best known, and the witness ought ordinarily to come from his neighborhood. But what the extent of such neighborhood is, and what credit is to be given to witnesses near and remote, are questions for the jury in determining the general character of the person in question.[2] One who went to the place of the plaintiff's former residence to learn her character while there, is not competent to prove it; nor if plaintiff kept boarders at the time of the slander, is evidence of their opinion admissible; nor can one testify who knows nothing about the plaintiff's reputation but what he heard from witnesses at a prior circuit.[3] A jury, in estimating character, are to take the testimony of witnesses who are supposed to be able or capable of reflecting, in general terms, the judgment of the public.[4] Proof of the bad reputation of the plaintiff, although of a kind that could not have been caused by the slander, must be of his reputation prior to or at the time of the publication complained of.[5] His bad reputation subsequent to the publication

[1] Hatfield *v.* Lasher, 81 N. Y. 249.

[2] Powers *v.* Presgroves, 38 Miss. 227; Storey *v.* Early, 86 Ill. 461; and see Hanners *v.* McClelland, 76 Iowa, 318. The reputation of the plaintiff, among the minority of his neighbors, is inadmissible. (*Id.*; and see Swift *v.* Dickerman, 31 Conn. 285.)

In an action for accusing the plaintiff of unchasteness, where a witness deposes that plaintiff's character for chastity is bad, it is not necessary that the witness should first have been asked whether he knows plaintiff's general character for chastity. (Senter *v.* Carr, 15 New Hamp. 351.) A witness who has stated that plaintiff's character for moral worth is bad, may be asked, on cross-examination, what immorality is imputed to him. (Leonard *v.* Allen, 11 Cush. 241.) Plaintiff cannot introduce in rebuttal evidence of his good reputation. (Hitchcock *v.* Moore, 37 No. West. Rep. 914.)

[3] Douglass *v.* Tousey, 2 Wend. 352.

[4] Luther *v.* Skeen, 8 Jones Law (N. Car.), 356.

[5] Douglass *v.* Tousey, 2 Wend. 352; Plummer *v.* Johnson, 70 Wis. 131. Where plaintiff is a witness on his own behalf, then to discredit him his bad reputation at time of trial may be shown. (Calkins *v.* Colburn, 27 Week. Dig. 310; 10 N. Y. St. Rep. 778.) Where the charge was of general unchastity, it was held that under the general issue the general bad reputation of the plaintiff might be shown in mitigation. (Conroe *v.* Conroe, 47 Penn. 198; Kennedy *v.* Holborn, 16 Wis. 457.)

complained of may have been the effect of such publication.

§ 409. The defense of truth must be specially pleaded. The defendant cannot, under the general issue, prove the truth of the publication complained of.[1] But if the plaintiff give in evidence parts of the publication not set forth in the declaration, the defendant may, under the general issue, justify such parts.[2] The proof of the repetition by the defendant of the words complained of, after the commencement of the action, will not confer upon the defendant the right under the general issue to give evidence of the truth of the matter published.[3] *Prior to the change introduced by the Code of New York* (A. D. 1848), under the general issue the defendant cannot, even *in mitigation*, give evidence of any facts which conduce to prove the truth, or which form a link of evidence to that end.[4] The rule was that evidence in mitigation must be such as admitted the charge to be false,[5] And if a defendant failed to establish a plea of justification, he was not entitled to any benefit from the evidence given in support of such plea, and which *tended* to prove the truth of the charge.[6] Nor was a defendant allowed to prove in miti-

[1] Beardsley *v.* Bridgeman, 17 Iowa, 290. Porter *v.* Botkins, 59 Penn. 484; McCampbell *v.* Thornburgh, 3 Head (Tenn.), 109; Shirley *v.* Keathy, 4 Coldw. (Tenn.) 29; Barrows *v.* Carpenter, 1 Cliff. 204; Barns *v.* Webb, 1 Tyler, 17; Small *v.* McKenzie, Draper's Up. Can. Rep. 174; Padgett *v.* Sweeting, 65 Md. 404. *Semble*, that in slander of title the rule is otherwise. (Watson *v.* Reynolds, M. &. Malk. 3; see § 354, *ante*.)

[2] Henry *v.* Norwood, 4 Watts, 347; and see Woodburn *v.* Miller, Cheves, 194; Burke *v.* Miller, 6 Blackf. 155; Stow *v.* Converse, 4 Conn. 18; Wagner *v.* Holbrunner, 7 Gill. 296.

[3] Teagle *v.* Deboy, 8 Blackf. 134.

[4] Purple *v.* Horton, 13 Wend. 9; Scott *v.* McKinnish, 15 Ala. 662; Teagle *v.* Deboy, 8 Blackf. 134; Thompson *v.* Bowers, 1 Doug. (Mich.) 321; Swift *v.* Dickerman, 31 Conn. 285; Wagstaff *v.* Ashton, 1 Harring. 503; Grant *v.* Hover, 6 Munf, 13; Henson *v.* Veatch, 1 Blackf. 369; Else *v.* Ferris, Anthon, 36; Gilman *v.* Lowell, 8 Wend. 573; and see Owen *v.* McKean, 14 Ill. 459; Williams *v.* Miner, 18 Conn. 464; McAlister *v.* Libby, 25 Maine (12 Shep.), 474. Particular facts, which might form links in the chain of circumstantial evidence against plaintiff, cannot be received under the general issue in mitigation of damages. (Wormouth *v.* Cramer, 3 Wend. 395.)

[5] Cooper *v.* Barber, 24 Wend. 105.

[6] Fero *v.* Ruscoe, 4 N. Y. 162.

gation any circumstance which tended to prove the truth of the charge, although he expressly disavowed a justification, and admitted the falsity of the charge.[1] But he might prove in mitigation circumstances which induced him erroneously to make the charge complained of, and thereby rebut malice, *provided* the evidence did not necessarily imply the truth of the charge, or tend to prove it true.[2] A defendant justifying, and failing in his proof, may offer evidence in mitigation of damages,[3] if it is set up in his answer.[4] The Code of New York has so far modified these rules as to admit, in mitigation, circumstances which *tend* to prove the truth of the charge, and to give a defend-

[1] Petrie *v.* Rose, 5 Watts & Serg. 364; Watson *v.* Moore, 2 Cush. 133; Regnier *v.* Cabot, 2 Gilman, 34; Vessey *v.* Pike, 3 C. & P. 512; Bailey *v.* Hyde, 3 Conn. 466.

[2] Minesinger *v.* Kerr, 9 Barr, 312; Shilling *v.* Carson, 27 Md. 175; Howard *v.* Thompson, 21 Wend. 319. Plaintiff was arrested for beating his wife, and taken before an alderman; defendant published an account of the arrest, held he might show the circumstances which induced the publication. (Donnelly *v.* Swain, 2 Phila. Rep. 93; see Morris *v.* Lachman, 68 Cal. 109; Bronson *v.* Bruce, 59 Mich. 596, and note thereto; Regensberger *v.* Kiefer, 7 Atl. Rep. 724; Ev'g News Asso. *v.* Tryon, 42 Mich. 549; Edwards *v.* Kansas City Times, 32 Fed. Rep. 813.) Defendant may show in mitigation that he copied the matter complained against from the journals of Congress. (Romayne *v.* Duane, 3 Wash. C. C. 246; *ante*, note 3, p. 324, and p. 604.

Held, in action against the publishers of a newspaper, that defendant could not show that an article similar to that complained of had shortly before been published in another newspaper. (Sheahan *v.* Collins, 20 Ill. 325.) In slander for saying, "Negro Jude said, &c., and it is reported everywhere," evidence that the negro did use the actionable words, held admissible in mitigation as showing defendant's motive. (Williams *v.* Greenwade, 3 Dana, 432.) Where a defendant utters defamatory matter as on his own knowledge, evidence will not be received on the trial that the matter was communicated to him by another. (Elliott *v.* Boyles, 31 Penn. 65.) The fact of the article being copied from another paper, held a ground for giving only nominal damages. (Davis *v.* Cutbush, 1 Fost. & F. 487.)

[3] Morehead *v.* Jones, 2 B. Monroe, 210; Landis *v.* Shanklin, 1 Smith (Ind.), 78; West *v.* Walker, 2 Swan (Tenn.), 32; Thomas *v.* Dunaway, 30 Ill. 373; Pallett *v.* Sargent, 36 N. Hamp. 496; *contra*, Shelton *v.* Simmons, 12 Ala. 466; Code of Rem. Just. § 535. Defendant having justified as to only part of the charges in a publication, may prove in mitigation the truth of that part of the charges not justified. (Bennett *v.* Smith, 23 Hun, 50.) Jury may consider in mitigation of damages testimony which has a tendency though it fails to sustain an answer of justification. (Henderson *v.* Fox, 6 So. East. Rep. 164 [Ga.]; Moore *v.* Francis, 3 N. Y. Suppl. 162; see Battell *v.* Wallace, 30 Fed. Rep. 229; Bailey *v.* Hyde, 3 Conn. 466.)

[4] Russ *v.* Brooks, 4 E. D. Smith, 644; Willower *v.* Hill, 72 N. Y. 36; Wood *v.* Helbish, 23 Mo. App. 389; Blanchard *v.* Tulip, 32 Hun, 638.

ant (who has claimed the right by his answer) the benefit of evidence in support of a plea or answer of justification, when such evidence falls short of proof, but nevertheless *tends* to prove the truth of the charge.[1] It is the essence of mitigating circumstances that they do not constitute a total defense, but are those facts from which the person acting upon them might reasonably suppose that the act charged had been committed.[2] Anything which tends to disprove malice in the publisher, although tending to prove the truth of the alleged libel, is admissible in mitigation.[3] To prove absence of malice "it is indispensable to prove that defendant believed, and had some reason to believe, the charge to be true *when it was made.* There are but two conceivable modes of doing it: one by proving that he received such information from others as induced him to believe the charge to be true; the other by showing the existence of facts within his knowledge calculated to produce such a belief."[4] Thus defendant may show that his

[1] Dolevin *v.* Wilder, 34 How. Pr. Rep. 488; Stanley *v.* Webb, 21 Barb. 148; Bennett *v.* Matthews, 64 Barb. 410. As to the rule that defendant might show in mitigation belief in the truth not amounting to the actual truth, see Williams *v.* Miner, 18 Conn. 464; Stees *v.* Kemble, 27 Penn. St. R. 112; Hutchinson *v.* Wheeler, 35 Vt. (6 Shaw). 330; Gilman *v.* Lowell, 8 Wend. 573; Gorton *v.* Keeler, 51 Barb. 475; Byrket *v.* Monohon, 7 Blackf. 83; Cooke *v.* O'Brien, 2 Cranch C. C. R. 17; Turner *v.* Foxall, *Id.* 324; Fountain *v.* West, 23 Iowa, 9; Huson *v.* Dale, 19 Mich. 17. Testimony offered by the defendant to show that the words charged were spoken with reference to a bill in chancery which he supposed was sworn to by plaintiff, and did contain false allegations, but which he afterwards ascertained was sworn to by another, is inadmissible in mitigation of damages. (Owen *v.* McKean, 14 Ill. 459; but see Purple *v.* Horton, 13 Wend. 9; Van Derveer *v.* Sutphin, 5 Ohio St. 293.) For the purpose of proving that the owner of a building which has been set on fire had reason to believe that a particular person was the incendiary, and used good faith in making statements charging him with the crime, evidence that he was informed of declarations and acts of the suspected person, tending to show his guilt, is competent. (Lawler *v.* Earle, 5 Allen [Mass.], 22.) Where defendant charged plaintiff with being a horse thief, held defendant in mitigation might prove that in fact he had been robbed of a horse. (Morris *v.* Lachman, 68 Cal. 109.)

[2] Bradner *v.* Falkner, 93 N. Y. 517; Knox *v.* Com'l Agency, 1 N. Y. St. Rep. 86.

[3] Bush *v.* Prosser, 11 N. Y. 347; Bisbey *v.* Shaw, 12 *Id.* 67; Daly *v.* Byrne, 1 Abb. N. C. 150; and so held in Michigan, Huson *v.* Dale, 19 Mich. 17; and Indiana, Heilman *v.* Shanklin, 60 Ind. 424.

[4] Bush *v.* Prosser, 11 N. Y. 347; Hatfield *v.* Lasher, 81 N. Y. 249; 17 Hun, 23; Cooper *v.* Barber, 24 Wend. 105; Bisbey *v.* Shaw, 12 N. Y. 67.

general agent, to whom certain representations were made, communicated them to him, defendant, and that he believed them to be true.[1] So defendant was allowed to show that he was imposed upon by forged letters,[2] or any circumstances tending to show he acted in good faith, and that after using all proper precaution he had reason to believe the publication to be true.[3] And where defendant charged plaintiff with procuring an abortion on his, defendant's, daughter, in an action for such charge defendant was allowed to show in mitigation and to disprove malice that prior to speaking the words he had been so informed by his daughter.[4] Defendant may testify that he believed the charges to be true before he published them,[5] but it is not mitigation to prove that at the time of the publication defendant expressed his disbelief in the truth of the charge.

Matter happening after the publication of the libel is not admissible in mitigation.[6]

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[1] Kimball *v.* Herald Co. 21 Week. Dig. 34. In such a case plaintiff cannot show that the agent had a bad reputation for truth. (Hinman *v.* Hare, 5 N. Y. St. Rep. 505; and see Reg. *v.* Labouchere, 14 Cox Cr. Cas. 419; Alliger *v.* Brooklyn Daily Eagle, 25 N. Y. St. Rep. 330.)

[2] Storey *v.* Early, 86 Ill. 461.

[3] Scripps *v.* Foster, 41 Mich. 742; Moore *v.* Francis, 3 N. Y. Suppl. 162; Moore *v.* Munk, 3 Bradw. (Ill.) 114; Thompson *v.* Downing, 15 Neb. 195; Burt *v.* McBain, 29 Mich. 260; Lothrop *v.* Adams, 133 Mass. 471. The testimony of a witness who heard or read the charge, that he did not believe it, is not admissible in mitigation. (Richardson *v.* Barker, 7 Ind. 567.)

[4] Calkins *v.* Colburn, 27 Weekly Dig. 310; 10 N. Y. St. Rep. 778; and see Hatfield *v.* Lasher, 81 N. Y. 246; Willower *v.* Hill, 72 N. Y. 361; Bennett *v.* Smith, 23 Hun, 50. An action for imputing unchastity to an unmarried female, when the defenses were justification and mitigating circumstances, evidence that plaintiff's physical appearance was that of a pregnant woman is admissible. (Sturges *v.* Wiltsie, 19 W'kly Dig. 266.)

[5] Morris *v.* Lachman, 68 Cal. 109. Defendant may show in mitigation a prior publication by others. (Hewett *v.* Pioneer Press Co. 25 Minn. 198; but see § 417, *post.*) Defendant may on his own behalf testify as to the existence or non-existence of malice on his part. (Cowell *v.* Day, 18 Week. Dig. 97; Scranton *v.* Chase, 4 Law Times Rep. N. S. 17 [Pa.]; *contra*, Barr *v.* Hack, 46 Iowa, 308.) And where he offers himself as a witness, he may on cross-examination be asked what was his intent in making the publication. (Com. *v.* Damon, 17 The Reporter, 559 [Mass.]; see *ante*, note 1, p. 63; note 1, p. 662.)

[6] Edwards *v.* Kansas City Times, 32 Fed. Rep. 813.

§ 410. Whether or not the defendant may, in mitigation of damages, give evidence of improper conduct of the plaintiff calculated to invite the language complained against, and affording just ground to believe it true, seems doubtful.[1] In one case, for words impugning the chastity of the plaintiff's wife, the defendant was permitted to prove, in mitigation of damages, that the plaintiff's wife and an unmarried man had lived together alone in one house.[2]

§ 411. It has been held in some cases that the defendant may, in mitigation of damages, prove that *prior* to the publication complained of, a general report or suspicion existed that the plaintiff had committed the act charged.[3] The decisions to the contrary are quite numerous.[4] De-

[1] See Whrede *v.* Bennett, in note Van Santvoord's Pleadings, by Moak, 576, 3d ed.

[2] Reynolds *v.* Tucker, 6 Ohio St. 516; and see Bradley *v.* Heath, 12 Pick. 163; Haywood *v.* Foster, 16 Ohio, 88; Minesinger *v.* Kerr, 9 Barr, 312; Shoulty *v.* Miller, 1 Carter (Ind.), 544; Leicester *v.* Walter, 2 Camp. 251. But such evidence was rejected, although defendant also proposed to show that at the time the words were uttered a public investigation was going on, involving an inquiry into the plaintiff's conduct, and was a subject of public remark. (Knight *v.* Foster, 39 N. H. 576; and see Regnier *v.* Cabot, 2 Gilman, 34.) Evidence of defendant's suspicions on the subject is inadmissible. (Henson *v.* Veatch, 1 Blackf. 369.) Held admissible under a plea of justification. (Montgomery *v.* Knox, 23 Fla. 595.)

[3] Wetherbee *v.* Marsh, 20 N. Hamp. 561; Case *v.* Marks, 20 Conn. 248: Bridgman *v.* Hopkins, 34 Vt. (5 Shaw), 532; Van Derveer *v.* Sutphin, 5 Ohio St. 393; Young *v.* Slemons, Wright, 124; Knobell *v.* Fuller, Peake Ad. Cas. 139; Cook *v.* Barkley, 1 Penn. N. J. Rep. 169; Smith *v.* Richardson, Bull. N. P. 9; Fuller *v.* Dean, 31 Ala. 654; Morris *v.* Barker, 4 Harring. 520; Springstein *v.* Field, Anthon, 252; Foot *v.* Tracy, 1 Johns. 45; Henson *v.* Veatch, 1 Blackf. 369; Commons *v.* Walters, 1 Port. 323; Fletcher *v.* Burroughs, 10 Iowa (2 With.), 557; and see Moyer *v.* Pine, 4 Mich. 409; Bradley *v.* Gibson, 9 Ala. 406; Sheahan *v.* Collins, 20 Ill. 325; Strader *v.* Snyder, 67 Ill. 404; Peterson *v.* Morgan, 116 Mass. 350; Clark *v.* Brown, *Id.* 504; Wilson *v.* Noonan, 35 Wis. 321; Heilman *v.* Shanklin, 60 Ind. 424; Barr *v.* Hack, 46 Iowa, 308.

[4] Young *v.* Bennett, 4 Scam. 43; Sanders *v.* Johnson, 6 Blackf. 50; Fisher *v.* Patterson, 14 Ohio, 418; Scott *v.* M'Kinnish, 15 Ala. 662; Anthony *v.* Stephens, 1 Mo. 254; Haskins *v.* Lumsden, 10 Wisc. 359; Beardsley *v.* Bridgman, 17 Iowa, 290; Pease *v.* Shippen, 80 Penn. St. 513; 15 Alb. Law Jour. 115; Alderman *v.* French, 1 Pick. 1; Bowen *v.* Hall, 20 Vt. 232; Hancock *v.* Stephens, 11 Humph. 507; Skinner *ads.* Powers, 1 Wend. 451; Matson *v.* Buck, 5 Cow. 499; Watkin *v.* Hall, 9 Best & S. 279; Scott *v.* Sampson, 8 Q. B. D. 491. Where the charge was of corrupt practices, and only general issue pleaded, defendant's counsel was not permitted to ask a witness if he had

fendant, to avail himself of a prior report, must show that he knew of such report before he made the publication complained against.[1] What two or three persons had said in relation to plaintiff's character, was held inadmissible.[2] In case for slander, imputing gross ill-treatment by the plaintiff of a female, under the plea not guilty, the evidence of the plaintiff showing that the words were spoken in answer to an inquiry whether he had not imputed, &c., and inquiry by the plaintiff who was the author of the slander, the defendant replying that he had heard of the imputation, and that the report was current, and that he had reason to believe it true, but refused to give up the reporter, held that the defendant might show, by cross-examination, that such report had in fact prevailed, and was a topic of conversation before the uttering of the words by the defendant.[3] In an action for a libel, the defendant, to support a charge against the plaintiff of having set up and supported an infidel club, offered evidence that a club to which the plaintiff belonged had the general character of an infidel club. It was held that such evidence was not admissible either to justify or mitigate the charge.[4]

§ 412. The defendant may, in mitigation of damages, show the plaintiff's standing and condition in society.[5]

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heard that plaintiff was addicted to such practices. (Thompson *v.* Nye, 20 Law Jour. Q. B. 185; 16 Q. B. 175.) In —— *v.* Moor (1 M. & S. 284), defendant was permitted, on cross-examination of a witness for the plaintiff, to ask whether he had not heard reports of plaintiff being guilty of offenses similar to the offense charged. See Taylor on Evidence, 315, 2d ed., where the English authorities are collected, and are by the author said to preponderate in favor of the reception of the evidence of general suspicion in mitigation. (And see Wolmer *v.* Latimer, 1 Jurist, 19.)

[1] Lothrop *v.* Adams, 133 Mass. 471.

[2] Regnier *v.* Cabot, 2 Gilman, 34.

[3] Richards *v.* Richards, 2 Mo. & Rob. 557. Rumors cannot be proven in mitigation unless so general as to affect the general character. (Marker *v.* Dunn, 68 Iowa, 720.) The existence of rumors of plaintiff's guilt not admissible. (Root *v.* King, 7 Cow. 629; Gilman *v.* Lowell, 8 Wend. 579; Bush *v.* Prosser, 11 N. Y. 347; Hatfield *v.* Lasher, 81 N. Y. 250; Larabee *v.* Minnesota Tribune Co. 36 Minn. 141.

[4] Stow *v.* Converse, 4 Conn. 17.

[5] Larned *v.* Buffinton, 3 Mass. 546; Whitney *v.* Janesville Gazette, 5 Bissell, 330; Bodwell *v.* Swan, 3 Pick. 376; Howe *v.* Perry, 15 Pick. 506; Bennett *v.* Matthews, 64 Barb. 410. The Supreme Court of Pennsylvania

§ 413, The declaration of a defendant, made *prior* to the publication complained of, may be given in evidence to mitigate the damages; as where the defendant had employed a printer to print the libel complained of, it was held that he might, to show the absence of ill-will, and to mitigate damages, prove that at the time of the employment he instructed the printer to keep the matter as private as possible.[1] But declarations or acts of a defendant, made *subsequently* to the publication complained of, cannot be received in mitigation.[2] A full and unquali-

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(Moyer *v.* Moyer, 49 Penn. St. 210) held, in an action of slander for charging perjury, evidence of plaintiff's general character for truth was admissible in mitigation. (And see 1 Up. Can. Law Jour. N. S. 248.) Proof should be limited to time prior to commencement of action. (Calkins *v.* Colburn, 10 N. Y. St. Rep. 778.) Where there is nothing in the case to impeach the reputation of the plaintiff, the court should not charge that the jury may consider the plaintiff's general reputation. (Padgett *v.* Sweeting, 65 Md. 404.)

[1] Taylor *v.* Church, 8 N. Y. 452; and see Stallings *v.* Newman, 26 Ala. 300; Lick *v.* Owen, 47 Cal. 252; Hagan *v.* Hendry, 18 Md. 177; Bond *v.* Douglass, 7 C. & P. 626; Vines *v.* Serell, *Id.* 163; Inman *v.* Foster, 8 Wend. 602. An injunction of secrecy upon the person to whom the publication was made held not to be a defense. (McGowan *v.* Manifee, 7 T. B. Monr. 314.) It was held proper, on the trial of an indictment against the editor of a newspaper for libel, to ask a witness if at the time of the publication the defendant was not absent and knew nothing of the transaction. (Commonwealth *v.* Buckingham, Thacher's Crim. Cas. 29.) Under a defense of truth it cannot be shown that the publication was without defendant's knowledge. (Buckley *v.* Knapp, 48 Mo. 152.) Defendant may in mitigation set up that the publication was confidential. (Jeffras *v.* McKillop & Sprague Co. 4 Sup. Ct. Rep. [T. & C.] 578; 2 Hun, 351; and see Edwards *v.* Kansas City Times, 32 Fed. Rep. 813.

[2] Scott *v.* McKinnish, 15 Ala. 662; Bradford *v.* Edwards, 32 Ala. 628. In Yeates *v.* Reed (4 Blackf. 463), an action against husband and wife for slander by the wife, it was held that the husband's efforts to prevent the circulation of the libel complained of was not receivable in mitigation; it was no mitigation of the guilt of the wife. The defendant cannot, to support his plea of justification, give evidence of transactions or conversations between himself and others, to which plaintiff was not privy. (Jenkins *v.* Cockerham, 1 Ired. 309; and see Barfield *v.* Britt, 2 Jones Law [N. Car.], 41.) And where defendant charged plaintiff with being a thief, a rogue and a swindler, and justified on the ground that plaintiff had bought goods of him, defendant, and resold them, but had not paid defendant for them, held that defendant could not prove these facts, they not being known to the persons present when the charge was made. Martin *v.* Loei, 2 Fost. & F. 654; and see Wakelin *v.* Morris, *Id.* 27.) Where the action is for accusing plaintiff of stealing, the general bad character of plaintiff is not admissible in mitigation. (Williston *v.* Smith, 3 Kerr [N. Brunswick], 443; see § 415, *post.*)

fied retraction of the libel complained of before action commenced is admissible in mitigation.[1]

§ 414. The defendant may set up, in mitigation of damages, that he made the publication in a moment of heat and passion, induced by the immediately preceding acts of the plaintiff.[2] The defendant may, therefore, in

[1] Hotchkiss *v.* Oliphant, 2 Hill, 510; and see Morey *v.* Morning Jour. 17 N. Y. St. Rep. 266; Wallace *v.* Storey, 60 Ill. 51. But hesitation, lurking insinuation, an attempted perversion of the import of the language of the first libel, or a substitution of one calumny for another, only aggravate the offense; and if the publisher, when advised of his error, hesitate to correct it, the case rises into a case of premeditated wrong, and he becomes a fit subject for exemplary punishment. (*Id.*; Herman *v.* Bradstreet Co., 19 Mo. App. Rep. 227.) A subsequent explanation and qualification of the slander is not competent evidence under a plea of justification. (Lathan *v.* Berry, 1 Port. 110; and see M'Alexander *v.* Harris, 6 Munf. 465.) Defendant's subsequent assertions of the truth of the slander are not evidence of its truth. (Rice *v.* Withers, 9 Wend. 138.) As to the effect of a withdrawal, or recantation, see Larned *v.* Buffinton, 3 Mass. 546; Brown *v.* Brooks, 3 Ind. 518; Alderman *v.* French, 1 Pick. 19; Kent *v.* Bonzey, 38 Maine (3 Heath), 435; Mapes *v.* Weeks, 4 Wend. 663; 6 & 7 Vict. ch. 96; 8 & 9 Vict. ch. 95. In Linney *v.* Maton (13 Texas, 449), it was held that an immediate retraction of a charge made orally, and in the presence of all who heard the charge, was a defense to an action founded on such charge; and see Winchell *v.* Strong, 17 Ill. 597. Where one called another a rogue, in the hearing of bystanders, in a moment of irritation, and in reference to his unwillingness to settle a debt due him, and no injury resulted from the words, it was held not actionable. (Artieta *v.* Artieta, 15 La. An. 48.) In Alabama, retraction before suit is, by statute, made mitigation. (See Bradford *v.* Edwards, 32 Ala. 628.) Retraction after suit begun is not admissible in mitigation. (Tryon *v.* Even. News Asso. 42 Mich. 549.) Insanity, total or partial, in mitigation. (Yeates *v.* Reed, 4 Blackf. [Ind.] 463.)

[2] Dolevin *v.* Wilder, 34 How. Pr. Rep. 448; Miles *v.* Harrington, 8 Kansas, 425; Palmer *v.* Lang, 7 Daly, 33; Warner *v.* Lockerby, 31 Minn. 421; Mousler *v.* Harding, 33 Ind. 176. Defendant cannot set up any act or declaration of plaintiff's in mitigation unless such act or declaration formed part of the *res gestæ*. (Richardson *v.* Northrup, 56 Barb. 105, see Quinby *v.* Minnesota Tribune Co. 38 Minn. 528. Defendant who would rely upon heat of passion in mitigation of damages, must set forth the acts and language of the plaintiff which he claims caused his passion. It is not sufficient to allege simply that he uttered the words in heat of passion caused by plaintiff. In slander, if the words were spoken through the heat of passion, or under excitement produced by the immediate provocation of the plaintiff, such excitement or passion may be shown in mitigation of damages; and in Iowa, without alleging them specifically in the answer. (McClintock *v.* Crick, 4 Iowa, 453; and see Steever *v.* Beehler, 1 Miles, 146; Brown *v.* Brooks, 3 Ind. 518; Larned *v.* Buffinton, 3 Mass. 546; Mousler *v.* Harding, 33 Ind. 176; McDougald *v.* Coward, 95 No. Car. 368.)

The fact that the slanderous words were spoken in a sudden heat of passion, or under great provocation, should be considered by the jury in mitigation of damages. (Powers *v.* Presgroves, 38 Miss. 227; Ranger *v.*

mitigation, prove prior publication by the plaintiff of a provoking character.[1] Acts or publications of persons other than the plaintiff are not receivable in mitigation; as where the plaintiff's father, shortly before the uttering of the slander, used irritating language to the defendant, held that that fact was inadmissible in mitigation.[2] Where, in an action for libel, the defendant sought to give in evidence libelous publications by the plaintiff of the defendant in newspapers and periodical works; held, that to make such admissible, it must be shown that they came to the knowledge of the party supposed to be provoked thereby, and that the court could not infer from the mere depositing newspapers in the defendant's name, as editor, at the stamp office, under 38 Geo. III, c. 78, § 17, that they were published by, or came to the knowledge of, the defendant.[3]

Goodrich, 17 Wisc. 78; Duncan *v.* Brown, 15 B. Monr. 186; Traphagen *v.* Carpenter, 1 City Hall Reporter, 55; Else *v.* Ferris, Anthon, 36; Jauch *v.* Jauch, 50 Ind. 135; Miles *v.* Harrington, 8 Kansas, 425; Fisher *v.* Rottereau, 2 McCord [So. Car.], 189; Flagg *v.* Roberts, 67 Ill. 485; Hansler *v.* Harding, 33 Ind. 176.) A charge that if defendant's language was a mere outburst of passion, induced by plaintiff's conduct towards his, defendant's, wife and himself, aad was neither intended nor understood by the bystanders to charge plaintiff with the commission of a crime, they should find for defendant, is a proper instruction. (Ritchie *v.* Stenius, 41 No. West. Rep. 687 [Mich.].)

[1] Thomas *v.* Dunaway, 30 Ill. 373; Wakley *v.* Johnson, 1 Ry. & Mo. 422; Whittemore *v.* Weiss, 33 Mich. 348; Tarpley *v.* Blabey, 2 Bing. N. C. 437. Defendant may, in mitigation, give evidence that plaintiff has been in the practice of vilifying him, and that he was influenced to use the language with which he is charged by the abuse of plaintiff, and that may be shown by defendant's declaration. The jury is to determine whether the language which defendant used was used because of such provocation received from plaintiff. (Botelar *v.* Bell, 1 Md. 175; Palmer *v.* Lang, 7 Daly, 33.) The effect of parties publishing defamatory matter one against the other should be to give nominal damages only. (Pugh *v.* McCarty, 40 Ga. 445; Hibbs *v.* Wilkinson, 1 Fost. & Fin. 608; *ante*, p. 452, note 1.) Where plaintiff published in a newspaper reflections on defendant, and defendant replied, held that if in so doing he said more than was necessary for his defense was a question for the jury. (O'Donaghue *v.* Hussey, Ir. Rep. 5 Com. Law, 124.) As to provocation in mitigation, see Hackett *v.* Brown, 2 Heiskell (Tenn.), 264; Massuere *v.* Dickens, 70 Wis. 83; Warner *v.* Lockerby, 31 Minn. 421; and under Code of North Carolina, Knot *v.* Burwell, 96 No. Car. 588; but see cases in note 2, p. 683. Defendant cannot set up in mitigation that the publication was made amid the excitement of a political campaign. (Rearick *v.* Wilcox, 81 Ill. 77.)

[2] Underhill *v.* Taylor, 2 Barb. 348.

[3] Watts *v.* Fraser, 2 Nev. & P. 157. Always, where mitigating cir-

§ 415. All the circumstances connected with the publication complained of should go to the jury;[1] and therefore, in an action for a libel, the defendant may give in evidence a former publication by the plaintiff, to which the libel was an answer, to explain the subject-matter, occasion and intent of the defendant's publication, and in mitigation of damages.[2] And a previous publication by the plaintiff, to which the alleged libel is an answer, is admissible. The judge, before admitting or excluding it, may peruse it, in order to decide upon its character.[3] And all papers referred to in a libel, may be admitted for the purpose of explanation and interpretation.[4] A postscript is admissible.[5] Prefixing a previous publication as a text to the libel complained of, does not *per se* make such previous publication admissible in evidence.[6]

§ 416. Controversies between the plaintiff and defendant prior to the publication complained of, and hav-

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cumstances are offered in evidence for the purpose of repelling the presumption of malice, it should be shown that the defendant knew of them at the time he made the charge. (Swift *v.* Dickerman, 31 Conn. 285; Dolevin *v.* Wilder, 34 How. Pr. Rep. 488; Hatfield *v.* Lasher, 57 *Id.* 258; 81 N. Y. 246; Odgers on Libel, 229, Am. Edit.; and see § 240, *ante;* Reynolds *v.* Tucker, 6 Ohio St. 516; Whitney *v.* Janesville Gazette, 5 Bissell, 330.)

[1] Cook *v.* Barkley, 1 Penn. N. J. 169. The fact that the publication, though false, was an honest effort to repel an accusation made by plaintiff, is a mitigating circumstance. (Shattuc *v.* McArthur, 29 Fed. R. 136 [Mo.].)

[2] Hotchkiss *v.* Lathrop, 1 Johns. 286. A prior publication by plaintiff not admissible in justification. (*Id.;* Southwick *v.* Stevens, 10 Johns. 443.) Other libels alleged to have been published by plaintiff of defendant, not relating to the same subject, are not admissible in evidence, either in bar of the action or in mitigation of damages, both on the ground that the plaintiff had no notice of such defense, as well as of the inconvenience, by leading to a multiplicity of inquiries. (May *v.* Brown, 3 B. & Cr. 113; 4 D. & R. 670; Tarpley *v.* Blabey, 2 Bing. N. C. 437; see Watts *v.* Fraser, 7 C. & P. 369; 1 Mo. & Rob. 449; Brown *v.* Autrey, 78 Ga. 752; note 1, p. 682.)

[3] Maynard *v.* Beardsley, 7 Wend. 560; Beardsley *v.* Maynard, 4 Wend. 336; Massuere *v.* Dickens, 70 Wis. 83.

[4] Nash *v.* Benedict, 25 Wend. 645; Mullett *v.* Hulton, 4 Esp. 248; *ante*, p. 631, note 4.

[5] Coleman's Case, 2 City Hall Recorder, 49.

[6] Gould *v.* Weed, 12 Wend. 12. A subsequent publication cannot be given in evidence to determine the character of a publication, whether it is libelous or not. Two articles, to be so used, must appear simultaneously in the same paper or book. (Usher *v.* Severance, 2 App. [20 Maine], 9; but see *contra*, Brunswick *v.* Harmer, 14 Q. B. 185).

ing no connection with the subject-matter of the publication, cannot be shown to mitigate the damages.[1] Nor are previous publications by the plaintiff concerning the defendant admissible in mitigation, unless so immediately preceding the publication by the defendant as fairly to raise the presumption that the defendant made the publication under the impulse of the provocation.[2] The defendant may show, in mitigation, that he was provoked to the publication complained of by some contemporaneous or nearly contemporaneous act or declaration of the plaintiff. Simply to show provoking acts or declarations by the plaintiff *prior* to the publication by the defendant, is not sufficient.[3] In an action for a libel, in which the plaintiff was charged with being "a degraded scoundrel, liar and blackguard," it was held that the defendant might be allowed to prove, under the general issue, in mitigation of damages, that the plaintiff, shortly prior to the publication of said libel, charged the defendant with false swearing in a cause in which he was a witness.[4] In an action of slander against husband and wife, for words spoken by the wife, it is not competent for the defendant to prove

[1] Lister *v.* Wright, 2 Hill. 320. In an action of slander for words actionable in themselves, claiming general damages only; held, that, under the plea of the general issue, evidence that during the six years prior to the trial inveterate feelings of hostility had existed between the plaintiff and defendant, and that plaintiff had taken every opportunity to irritate defendant, was inadmissible. (Porter *v.* Henderson, 11 Mich. 20.)

[2] Maynard *v.* Beardsley, 7 Wend. 560; Beardsley *v.* Maynard, 4 *Id.* 336; Gould *v.* Weed, 12 *Id.* 12; Child *v.* Homer, 13 Pick. 503; Walker *v.* Winn, 8 Mass. 248; Ransone *v.* Christian, 49 Ga. 491; Quinby *v.* Minn. Tribune Co. 38 Minn. 528; McCarty *v.* Pugh. 40 Ga. 444. A question to a witness as to the state of feeling between the parties must refer to the time of the slanderous speaking. (Justice *v.* Kirlin, 17 Ind. 588.) If the words complained of were spoken in presence of plaintiff, and he replied to them, defendant may give such reply in evidence. (Bradley *v.* Bradner, 10 Cal. 371.)

[3] Morre *v.* Clay, 24 Ala. 235; Watts *v.* Fraser, 2 Nev. & P. 157; 7 Ad. & El. 223; 1 Jurist, 671; 1 M. & Rob. 449; Moore *v.* Oastler, 1 M. & Rob. 451, note; Bourland *v.* Eidson, 8 Gratt. 27; Willower *v.* Hill, 72 N. Y. 36. Libel published in the morning, held not to mitigate an assault on the libeler in the afternoon of the same day. (Fraser *v.* Berkeley, 7 C. & P. 621; disapproved of, Keiser *v.* Smith, 71 Ala. 481.)

[4] Davis *v.* Griffith, 4 Gill & Johns. 342.

that circumstances relating to the plaintiff's conduct were communicated to the husband before the slanderous words were uttered.[1]

§ 417. The defendant cannot, to mitigate damages, give evidence of his poverty;[2] of his apparent good humor at the time of speaking the words;[3] of his own bad character;[4] that no one believed anything he said;[5] that the defendant was not the author of the slander, and that he named the author at the time of the publication;[6] that

[1] Petrie *v.* Rose, 5 Watts & Serg. 364.

[2] Myers *v.* Malcolm, 6 Hill, 292; Palmer *v.* Haskins, 28 Barb. 90; Perrine *v.* Winter, 73 Iowa, 645; Pool *v.* Devers, 30 Ala. 672; and see cases cited, p. 652, note 2, *ante*. Where exemplary damages are claimed, defendant may show his poverty in mitigation. (Rea *v.* Harrington, 58 Vt. 181.)

[3] Weaver *v.* Hendrick, 30 Mo. (9 Jones), 502; see *ante*, p. 440, n. 2. Defendant being intoxicated at the time of publication, said to be a matter of mitigation. (Howell *v.* Howell, 10 Ired. 84.)

[4] Hasting *v.* Stetson, 130 Mass. 76.

[5] Howe *v.* Perry, 15 Pick. 506; *contra*, Gates *v.* Meredith, 7 Ind. 440. An imputation of theft, made in the presence of one witness only, who stated that he did not believe the charge, held no reason for restricting the damages to a nominal amount. (Markham *v.* Russell, 12 Allen, 573; and see Burt *v.* McBain, 29 Mich. 260.) The fact that the words were spoken in the presence of one witness only, was held to be receivable in mitigation in Traphagen *v.* Carpenter (1 City Hall Reporter, 55).

[6] Treat *v.* Browning, 4 Conn. 408; *contra*, Bennett *v.* Bennett, 6 C. & P. 588; Easterwood *v.* Quin, 2 Brev. 64; but see *ante*, § 210. Under some circumstances defendant may prove, in mitigation, that he derived his information from others (Kennedy *v.* Gregory, 1 Binn. 85; Galloway *v.* Courtney, 10 Rich. Law [S. Car.], 414; but see Thompson *v.* Bowers, 1 Doug. [Mich.] 321; Anthony *v.* Stephens, 1 Mo. 254), and from whom or how he derived his information (Leister *v.* Smith, 2 Root, 24); as that the charge was taken from the Journals of Congress (Romayne *v.* Duane, 3 Wash. C. C. 246; *ante*, p. 675, note 2); or copied from another paper. (Davis *v.* Cutbush, 1 Fost. & Fin. 487; Howell *v.* Pioneer Press Co. 23 Minn. 178.) That defendant published the libel on the communication of a correspondent, held not admissible in mitigation. (Talbutt *v.* Clark, 2 M. & Rob. 312.) Where A. published a libel taken from a paper published by B., as an extract from a paper published by C., it was *held*, in an action brought by C. against A., that the testimony of D. that he had heard A., before he published the libel, ask E. whether he had not seen it in the paper of C., and that E. answered "that he had," was inadmissible in mitigation of damages; but that E. himself should be produced, if his declaration were proper evidence. (Coleman *v.* Southwick, 9 Johns. 45.) In an action for the publication of a libel, the defendant asked a news collector, who wrote a part of the article complained of, "What inquiries and examinations he made, and what sources of information he applied to, before making the communication" which tended to charge the plaintiff with dishonesty and bad faith? *Held*, that the question was incompetent, and that the defendant, as a foundation for such question, could not prove that there was a general anxiety in the

the publication did not injure,[1] or that it benefitted the plaintiff;[2] or that others had previously published the same words;[3] a declaration of the plaintiff that the publication did him no injury;[4] or that he believed the defendant was not the author but only the repeater of the slander;[5] that plaintiff was an enemy of his (defendant's);[6] that plaintiff is a quarrelsome person;[7] or a malicious person;[8] that plaintiff had boasted of committing offenses of

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community in regard to the facts stated in the publication. (Sheckell *v.* Jackson, 10 Cush. [Mass.] 25.) And see Bond *v.* Kendall (36 Vt. 741), where it was held that defendant could not show the libel was a letter to B. containing the result of inquiries made concerning plaintiff at request of B. Where the action was for publishing the proceedings of a meeting, held that defendant might prove in mitigation that many severe expressions were used towards plaintiff which he did not include in his report. (Creighton *v.* Finlay, Arm. Mac. & Og. 385; and see Creevy *v.* Carr, 7 Car. & P. 64.)

[1] Titus *v.* Sumner, 44 N. Y. 266. On the trial of an action for slander it is not error to exclude a general offer by defendant to prove that plaintiff's reputation was not affected by the publication. The evidence would be a mere opinion of the witness, and is not directed to plaintiff's want of previous good character as affecting the amount of the recovery. (*Id.*)

[2] Calhoun *v.* M'Means, 1 Nott & McC. 422; Rex *v.* Woodfall, Lofft, 776. No man shall set up his own iniquity as a defense any more than as a cause of action. (Mansfield, Ch. J., Montefiori *v.* Montefiori, 1 W. Black. R. 363; see Stewart *v.* Wilkinson, 7 Law Times, 81; Fry *v.* Bennett, 28 N. Y. 328; note 7, p. 520, *ante.*

[3] Saunders *v.* Mills, 6 Bing. 213; Hinkle *v.* Davenport, 38 Iowa, 355; Willower *v.* Hill, 72 N. Y. 36; see Hewett *v.* Pioneer Press Co. 25 Minn. 198; Tracy *v.* Luke, 2 Vict. Law Rep. L. 64. Defendant may show in mitigation that in reproducing the article some passages unfavorable to plaintiff were omitted. (Creevy *v.* Carr, 7 Car. & P. 64.)

[4] Porter *v.* Henderson, 11 Mich. 20; Richardson *v.* Barker, 7 Ind. 567. In Quingley *v.* Phila. &c. R. R. Co. (2 How. U. S. Rep. 209), the defendants gave evidence of declarations by plaintiff that the matters out of which the libel arose had improved his business. In an action for libel, the answer denied malice and injury to plaintiff, and set up a justification. On the trial defendant offered to prove a conversation with plaintiff in which he stated he had sustained no damage, was ready to withdraw the suit, as he had not been injured at all, and that he would have withdrawn it, were it not for his lawyers, who had taken the case for what they could get out of it. which was excluded, held that it ought to have been received. (Samuels *v.* Even'g Mail Asso. 6 Hun, 5; see this case, 9 Hun, 288, and 75 N. Y. 604.) A witness was allowed to testify that when subpœnaed by plaintiff, he, witness, asked plaintiff, if he thought what defendant had said had been of any injury to him, to which plaintiff answered that he did not know that it had, but it had occasioned some of his creditors to crowd him. (Ostrom *v.* Calkins, 5 Wend. 264; see *ante*, note 7, p. 520; and note 2, p. 686)

[5] Evans *v.* Smith, 5 T. B. Monr. 363.

[6] Craig *v.* Catlet, 5 Dana, 325.

[7] Hosley *v.* Brooks, 20 Ill. 115; M'Alexander *v.* Harris, 6 Munf. 465.

[8] Forshee *v.* Abrams, 2 Clarke (Iowa), 572.

a like character with that charged;[1] that plaintiff was in the habit of abusing the defendant;[2] that plaintiff was a common libeler;[3] that plaintiff has sometimes published slander of other persons not the defendant;[4] or has threatened so to do;[5] a former recovery;[6] that defendant declared he could prove the truth of the words;[7] or in an action for slander of husband and wife, that they lived unhappily together;[8] or kept a disorderly house.[9]

INJUNCTION.

§ 417*a*. The courts will, in some cases, interpose by injunction to prevent the perpetration of a wrong, but as a general rule the publication of an alleged libel will not be stayed by injunction.[10] The court of Star Chambers was in the habit of restraining the publication of libels,[11] and

[1] Pallett *v.* Sargent, 36 N. Hamp. 496.

[2] Goodbread *v.* Ledbitter, 1 Dev. & Bat. 12; Wakley *v.* Johnson, 1 Ry. & M. 422; May *v.* Brown, 3 B. & Cr. 113; M'Alexander *v.* Harris, 6 Munf. 465; *contra*, see Botelar *v.* Bell, 1 Md. 173. In a suit for slander, for charging plaintiff with perjury, defendant cannot show that, upon a wholly different occasion, the plaintiff called him a liar and a perjured wretch. (Porter *v.* Henderson, 11 Mich. 20.)

[3] Maynard *v.* Beardsley, 7 Wend. 560; 4 *Id.* 336; Gould *v.* Weed, 12 *Id.* 12; see Sullivan *v.* O'Leary, 15 No. East. Rep. 775 (Mass.).

[4] Forshee *v.* Abrams, 2 Clarke (Iowa), 571.

[5] Cochran *v.* Butterfield, 18 N. Hamp. 115.

[6] The defendant is not allowed to give in evidence, in mitigation of damages, a former recovery of damages, against him, in favor of the same plaintiff, in another action for a libel, which formed one of a series of numbers published in the same gazette, and containing the libelous words charged in the declaration in the second suit. (Tillotson *v.* Cheetham, 3 Johns. 56.) The damages are not to be lessened by the fact that plaintiff has an action against other persons for publishing the same language. (Harrison *v.* Pearce, 1 Fost. & Fin. 567; Frescoe *v.* May, 2 *Id.* 123; and see Cook *v.* Ellis, 6 Hill, 467.)

[7] James *v.* Clarke, 1 Iredell, 397.

[8] Anon. 1 Hill (S. Car.), 251.

[9] Watson *v.* Moore, 2 Cush. 133.

[10] See, Restraining libel by injunction, 17 Irish Law Times, 40; Restraint of libellous publications, 53 Law Times, 112; Injunction to restrain slander in respect to business. by Robert P. Clapp, 23 Amer. Law Register, N. S. 701; Oral slander of one's business, Injunction against; 20 Central Law Jour. 13; Injunction to restrain defamation, 18 Irish Law Times, 627; Injunction to restrain libel and slander, 2 Manitoba Law Jour. 49; Enjoining publication of libels, 4 Cent. Law Jour. 170. The law and practice of Injunctions, by W. W. Kerr, with notes by Franklin I. Dickson, Chapter XIII. Injunction against the publication of a libel and against slander of Title.

[11] Hudson's Star Chamber.

after the abolition of that court, Chief Justice Scroggs, and the other Judges of the Court of Kings Bench, prohibited the publication of a periodical entitled "The Weekly Packet of Advice from Rome or the History of Popery." For this Scroggs was impeached.[1] Lord Ellenborough said *obiter* that the exhibition of a libelous painting might be restrained by injunction.[2] This dictum is said to have excited much astonishment in the minds of all the practitioners in the Court of Equity in England.[3] Lord Chancellor Parker granted an injunction to restrain the publication of a translation of a book from Latin into English, on the ground that the book in English might have a hurtful public tendency.[4] The Chancellor of New York, on demurrer to a bill praying an injunction to restrain the publication of a libelous pamphlet, dismissed the bill.[5] The House of Lords reversed a decree of the Scotch courts, enjoining the publication of a register of the names of persons whose notes had been protested.[6] Where plaintiff, a physician, applied for an injunction to restrain defendant from, among other things, publishing an advertisement, so expressed as to raise the inference that certain pills sold by defendant, were sold by him on behalf of plaintiff. The court held the advertisement amounted to a libel on plaintiff and dismissed the bill, because to grant the injunction "would imply that the court has jurisdiction to stay the publication of a libel, and I cannot think it

[1] 8 Howell's St. Trials, 189.

[2] DuBost *v.* Beresford, 2 Camp. Rep. 511.

[3] Horne's Case, 20 Howell's St. Trials, 799, note; 10 Campbell's Lives of the Chancellors, ch. ccxiii. Rev. G. W. Lemon was master of Norwich Grammar School and author of "English Etymology," A. D. 1783. It is related of him that one Beasely, an alderman of Norwich, offended him, and in revenge he gave in his book as the derivation of *obesity* "The exclamation of people who see a certain Norwich alderman, Oh Beasely! Oh beastly!! obesity!!! Beasely got an injunction to restrain the publication, and the sheet containing the obnoxious passage was cancelled. See Notes and Queries, 6th series, 111, April 2, 1881, page 271.

[4] Burnett *v.* Chetwood, 2 Merivale Rep. 441, note.

[5] Brandreth *v.* Lance, 8 Paige, 24; and see Hoyt *v.* McKenzie, 3 Barb. Ch. R. 320.

[6] Fleming *v.* Newton, 1 Ho. of L'ds Cas. 363.

has.[1] But where a jury has found matter to be libelous, there the courts in England will restrain its further publication.[2]

It has been said that the constitution of the State of New York, by providing that every citizen may freely speak, write and publish his sentiments on all subjects, deprives a court of equity of jurisdiction to restrain the publication of libelous matter.[3] An association incorporated to protect dealers from giving credit to delinquent debtors to members thereof, cannot be restrained by injunction from publishing, to its members, plaintiff's name as such delinquent, if he be in fact a delinquent.[4]

§ 417*b*. For a time there was in England a decided

[1] Clark *v.* Freeman, 11 Beavan, 112; 12 Jur. 149; 17 Law Jour. Rep. Ch. 142. This case is questioned in supplement to Drewry on Injunctions, 34; but not on the ground that the court had no jurisdiction to restrain the publication of a libel. The case is questioned also, in Springhead Spinning Co. *v.* Riley, Law Rep. 6 Eq. 551; Dixon *v.* Holden, Law Rep. 7 Eq. 488; Maxwell *v.* Hogg, Law Rep. 2 Eq. 310. An injunction to restrain publication of an alleged libel was denied. (Mulkern *v.* Ward, Law Rep. 13 Eq. 619.) And an application by Mr. Weldon to restrain a publication in London edition of New York Herald was denied by Lord Denman, September, 1889. Injunction will not be granted to restrain publication of libelous notices, unless no damages can be collected of defendant. (Burnett *v.* Tak, 45 Law Times Rep. 743.)

[2] Saxby *v.* Easterbrook, 3 C. P. D. 339; see 30 English Reports (Moak's Notes), 209.

[3] N. Y. Juvenile Guard. So. *v.* Roosevelt, 7 Daly, 188. In Louisiana it was held that a Court of Equity could not enjoin the publication of a libel. (The State *v.* Civ. Dist. Court, 34 La. Ann. 741.) And in Kidd *v.* Horry, 28 Fed. Rep. 773; 34 Alb. L. J. 371, Bradley, J., held that the English cases which favored an injunction were based upon the Common Law Procedure Act of 1854, and the Judicature Act of 1873; "but neither the statute law of this country nor any well considered judgment of the courts has introduced this new branch of equity into our jurisprudence." The Codes of Criminal Procedure and the Penal Code in Texas provide for restraining the publication of a libel and the distribution of libels, and for putting under bonds not to publish a libel. In Life Asso. of Amer. *v.* Boogher (3 Mo. App. 173; 4 Cent. Law. Jour. 40), it was held that a court of equity has no power to enjoin the threatened publication of a libel, though its publisher is insolvent and the damage will be irreparable. In Francis *v.* Flinn (6 Supreme Court Reporter, 1148), the Supreme Court of the United States sustained a demurrer to a bill seeking to restrain the publication of a libel, saying plaintiff had his remedy at law.

[4] Greene *v.* U. S. Dealers' and Protective Ass'n, 16 Abb. N. C. 419; 39 Hun, 300. An injunction will not be granted to restrain a mercantile agency from publishing representations as to the standing and character of a person, or as to his property, even though false, if there is no breach of trust or of contract involved. (Raymond *v.* Russell, 143 Mass. 295.)

leaning towards extending the jurisdiction in the matter of injunctions to restrain libelous publication. An injunction was granted against the publication of a notice stating that plaintiff, a merchant, was a partner in a bankrupt firm. Malins, V. C., in granting the injunction, said: "I go further, and say if it (the publication sought to be restrained) had only injured his (plaintiff's) reputation, it is within the jurisdiction of this court to stop the publication of a libel of this description, which goes to destroy his (plaintiff's) property, or his reputation, which is his property, and, if possible, more valuable than any other property. In this case, I go on general principle, and I am fortified by authority. General principle is in its favor, but authority is not wanting. . . . In the decision I arrived at, I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation. Professional reputation is the means of acquiring wealth, and is the same as wealth itself."[1]

An injuction was refused to restrain defendants, the committee of an association called "The Underwriters' Registry," from publishing to their subscribers, against a report of a survey of plaintiff's ship, "class suspended;" it was not libelous.[2] The courts in Massachusetts refused

[1] Dixon *v.* Holden, Law Rep. 7 Eq. 488; see, also, Springhead Spinning Co. *v.* Riley, Law Rep. 6 Eq. 551. In Reg. *v.* L'd Mayor of London (L. R. 16 Q. B. 774), it is said that Dixon *v.* Holden was overruled in Prudential Ins. Co. *v.* Knott, Law Rep. 10 Ch. 142. Any way the dictum of Malins, V. C., has not been followed nor received as authority. (See Poulet *v.* Chatto, Week. Notes, 1887, pp. 192, 230. Statement in Peerage as to legitimacy.)

[2] Clover *v.* Royden, Law Rep. 17 Eq. 190. The fact that plaintiff's *reputation* might suffer by his dismissal from defendant's service is not a ground for equitable interference to prevent his dismissal. (Johnson *v.* Shrewsbury R. R. Co. 3 De G. M. & G. 926.) In Shore *v.* Jones & Co. (London Times, Apl. 13, 1889), an injunction was granted by Mr. Justice Kay, restraining defendants "from publishing libelous and slanderous statements to the members of the

an injunction to prevent one alleging that a patent is an infringement of a previous patent,[1] and so in New York.[2]

§ 417*c*. In England the Judicature and the Patent acts,[3]

Junior Travellers' Club, or any other club, association, or person, respecting a debt or claim which defendants alleged to be due them from plaintiff, or respecting any of the matters referred to in a letter dated 20th March, 1889, written by defendants to plaintiff;" the letter being in these terms:

"SIR—We shall feel obliged if you will kindly favor us with a reply to our letter of the 4th of March. It is, of course, far from our desire to do anything detrimental to your future position, but unless you make some overtures towards satisfactory arrangement we think it right to say that we are acquainted with several members of the club, and we shall mention the matter to them."

And from continuing to write to the plaintiff further letters of the same character, the facts were that plaintiff was bankrupt in 1878, and was then indebted to defendants, his tailors. Defendants had, upon plaintiff's promise to pay their debt when able to do so, accepted a composition.

[1] Whitehead *v.* Kitson, 119 Mass. 484; citing Boston Diatite Co. *v.* Florence Manuf. Co. 114 Mass. 69; Prudential Ass. Co. *v.* Knott, Law Rep. 10 Ch. 142.

[2] Hovey *v.* Rubber Tip Pencil Co. 57 N. Y. 119. The action failed chiefly on the ground that it involved the validity of a patent, and so the State Court had no authority. In Flint *v.* Hutchinson Smoke Burning Co. (38 Fed. Rep. 546), the Federal Court refused an application for an injunction to restrain slander of title to a patent on the ground that the State Court had jurisdiction. As to jurisdiction, see Snow *v.* Judson, 38 Barb. 210. In Mauger *v.* Dick (55 How. Pr. R. 132), plaintiff sought to enjoin defendant from continuing to publish the following circular:

"To the wholesale and retail druggists of the United States:

"Gentlemen—We have been advised that certain parties are infringing our trade-mark rights by seeking to place in the market imitations of our soft capsules. We would therefore warn the trade of such goods, and state that since introducing our soft capsules, in 1865, we have advertised and characterized our medicines under that name, and that we have the exclusive right to use the trade mark 'Soft Capsules,' according to law. Therefore, we hereby give notice that we shall punish promptly, and to the full extent of the law, any encroachment on our rights, whether such be of a direct or indirect nature, and whether by selling or offering for sale any goods of that description bearing that name and not of our manufacture.

"No soft capsules are genuine unless bearing the signature of Dundas Dick & Co. on each box.

"Yours, very respectfully,

"DUNDAS DICK & CO."

The complaint was dismissed. (Citing Wolfe *v.* Burke, 56 N. Y. 115; Boston Diatite Co. *v.* Florence, 114 Mass. 69.) The publication of a circular denying plaintiff's patent right was restrained. (Croft *v.* Richardson, 59 How. Pr. R. 356.)

[3] By the Patents Act, 46 and 47 Vict. ch. 57, it is enacted that where any person who claims to be patentee of an invention, by circulars, advertisements or otherwise, threatens any other person with legal proceedings or liability in respect to any alleged manufacture, use, sale or purchase of such invention, any person aggrieved thereby may obtain an injunction against the continuance of such threats, &c., proviso, that this section shall not apply if the person making the threat with due diligence prosecutes an action for infringement. The threats need not relate to acts already committed. (Kurtz *v.* Spence, 57 Law Jour. Ch. 238; 5 Pat. Cas. Rep. 161.) Where the proviso is satisfied

have conferred the right to enjoin the publication, by circular or otherwise, that plaintiff is infringing defendant's patent.[1] Since those acts the court will restrain the publication of circulars which are injurious to trade or property, although no actual damage is proved in cases where the circular is calculated to injure plaintiff's business.[2] The court will not in general interfere unless satisfied that the statements contained in the document complained of are untrue, especially where the document is *prima facie* a privileged communication.[3] An injunction to restrain

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the act does not apply. (Challender *v.* Royle, 36 Ch. D. 425.) But during the pendency of an action for infringement the court will not allow circulars containing a positive statement of an infringement. (Goulard *v.* Lindsey, 4 Pat. Cas. Rep. 190; 56 Law Times, N. S. 506.)

[1] Rollins *v.* Hinks, Law Rep. 13 Eq. 355; Axman *v.* Lund, 18 *Id.* 330. In Hammersmith Skating Rink *v.* Dublin Skating Rink (10 Ir. R. Eq. 235), it is said that Rollins *v.* Hinks and Axman *v.* Lund, were virtually overruled by Prudential Asso. Co. *v.* Knott, Law Rep. 10 Ch. 142. But preliminary injunction ought not to be granted, except on a strong *prima facie* case to restrain the circulation of circulars honestly issued to warn people not to infringe a patent by purchasing certain goods. (Societe Anonyme des Manuf. de Glaces *v.* Tilghman's Patent Sand Blast Co. 49 Law Times Rep. N. S. 451; 25 Ch. Div. 1; distinguishing Beth *v.* Wilmot, Law Rep. 6 Ch. 239.) Plaintiffs were the makers of "Rainbow Water Raisers or Elevators," they commenced an action for an injunction to restrain defendants from issuing a circular cautioning the public against the use of such elevators as being direct infringements of certain patents of defendants. Plaintiffs subsequently gave notice of a motion to restrain the issue of this circular until the trial of the action. Defendants then commenced a cross-action, claiming an injunction to restrain plaintiffs from infringing their patents. Held, that as there was no evidence of *mala fides* on the part of defendants, they ought not to be restrained from issuing the circulars until their action had been disposed of; that they must undertake to prosecute their action without delay. (Household *v.* Fairburn, 51 Law Times Rep. N. S. 498.) In Palmer *v.* Travis (U. S. Cir. Co't, So. Dist. New York, 18 The Reporter, 99), the court refused to enjoin defendant from making representations in writing to his, plaintiff's, customers that plaintiff's hammocks infringed defendant's patent, on the ground that it was not alleged that defendant threatened to continue to make such representations, nor that plaintiff feared he would do so.

[2] Thomas *v.* Williams, 43 Law Times Rep. 91; Thorley's Cattle Food Co. *v.* Massam, Law Rep. 14 Ch. D. 763. In Singer Sewing Machine Co. *v.* Domestic Sewing Machine Co. (49 Ga. 70), an injunction to restrain a publication alleged to be injurious to plaintiff's business was refused.

[3] Quartz Hill Con. Gold Mining Co. *v.* Beal, 20 L. R. Ch. D. 501. In that case, a solicitor, acting for some shareholders, circulated, but only among the shareholders, a circular containing very strong reflections on the way in which the company had been brought out, and on the conduct of the promoters and the directors, and proposing a meeting of shareholders to take steps to protect their interests. The company commenced an action to restrain the further publication, and applied for an interlocutory injunction

the publication of articles reflecting unfavorably on a company was refused on the ground of the difficulty of granting an injunction which would not include matters that might turn out not to be libelous, and because, if the injunction was granted in terms to restrain what was libelous, the question of libel or no libel would have to be tried in a very unsatisfactory way on motion to commit for contempt.[1]

The parties were rivals in trade, defendants distributed a printed circular, which stated that they were the original firm, and after giving the title of a former action of injunction between them, headed by the word "caution," proceeded, "By the judgment, the defendant was ordered to undertake not to represent that his firm is, or that the defendants' firm is not the original firm of R. H. & Son. Messrs. R. H. & Son, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action." Held, the circular containing an untrue statement of the effect of the judgment in the other action, it was a libel injurious to plaintiff's trade, that it was not privileged, that the defendants had published it maliciously, and plaintiff was entitled to an injunction.[2] Where an honorary member of a friendly society issued a circular, among the clergymen of the parishes in which the society had district lodges, stating matters which were untrue and calculated to injure the business interests of the society. Held, that an injunction issue restraining the issuing of the circular until the trial of the action (for libel).[3]

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to restrain the publication of a libel. Held, the court had jurisdiction to interfere. (And see Anderson *v.* Liebig's Extract of Meat Co. 45 Law Times Rep. 757.)

[1] Liverpool Household Store Asso. *v.* Smith, 37 Ch. Div. 170.

[2] Hayward *v.* Hayward, 34 Law Rep. Ch. Div. 198. The Apollinaris Co. had prosecuted Fisher & Co. for an infringement of their trade-mark; the prosecution was stayed on Fisher & Co. giving a written apology. The Apollinaris Co. advertised this apology, whereupon Fisher & Co. applied for an injunction restraining the publication. The application was denied. (Fisher & Co. *v.* Apollinaris Co. Law Rep. 10 Eq. 297.)

[3] Hill *v.* Hart-Davis, 47 Law

§ 417*d*. It is said there cannot be any copy right in a libel.[1]

Times Rep. 82. An injunction was granted restraining the circulation of the following circular:

"Notice to Farmers—The undersigned butter merchants of Limerick will not, from Saturday next, purchase any butter packed in machine made casks or firkins, as we find them most injurious to the keeping qualities of butter; and we strongly urge on the farmers of Limerick, &c., the great necessity of packing their butter in hand-made casks or firkins." (Punch *v.* Boyd, 16 Irish Law Rep. 476; and see Dicks *v.* Brooks, 15 Ch. D. 22; Hammersmith Skating Rink *v.* Dublin Skating Rink, 10 Ir. Rep. Eq. 235; Halsey *v.* Brotherhood, 15 Ch. D. 514; 19 *Id.* 386; Herman Loog *v.* Bean, 26 *Id.* 306; Household *v.* Fairburn, 51 Law Times, N. S. 498; Riddle *v.* Clydesdale, 12 Co't of Sess. Cas. 4 Series, 976; Challender *v.* Royle, 36 Ch. D. 425; Kurtz *v.* Spence, 33 *Id.* 579; Barney *v.* United Telephone Co. 28 *Id.* 395; Duffield *v.* Linseed Cake Co. 31 Ch. Div. 638; Union Electric Co. *v.* Electric Power Co. 57 Law Times, N. S. 791.)

[1] Drone on Copyright, 181. There is no jurisdiction to enjoin against a wicked or libelous work merely on the ground of its mischievous character, and, on the other hand, if a work alleged to be copyright be tainted by immorality, libel or fraud, it is not acknowledged as property at law, and in that case, or even if it be of a doubtful tendency, the Court of Chancery will not interfere. (Adams' Equity, 5th Am. ed, A. D. 1868, page 426 [216]; citing Gee *v.* Pritchard, 2 Sw. 402; Du Bost *v.* Beresford, 2 Camp. 511; Wright *v.* Tallis, 1 M. G. & S. [Com. B. O. S.] 893; Southey *v.* Sherwood, 2 Meriv. 438; Lawrence *v.* Smith, 1 Jac. 471.)

"Jnjunctions had been granted against the piracy of the 'Dunciad' notwithstanding its libelous passages; and even against the piracy of Mrs. Bellamy's Memoirs, a work of notorious indecency. The law upon the subject had never been mooted, until, in an action brought by Dr. Priestley, the great apostle of Unitarianism, against the hundred, for the destruction of his manuscripts in the Birmingham riots, Lord Justice Eyre told the jury that if the evidence had shown the contents of the destroyed works to be in the nature of libels upon the government, he should have considered such proof as receivable against Dr. Priestley's claim. In this state of the law, an application was made by Dr. Walcot, the noted 'Peter Pindar,' for an injunction against the piracy of some of his works. Lord Eldon, grounding himself upon the common law as stated by Chief Justice Eyre, refused the injunction, and laid down the principle by which, from that time, this subject has been regulated. (Walcot *v.* Walker, 7 Ves. 1.) In the latter case of Mr. Southey's application for an injunction to restrain the sale of 'Wat Tyler,' a seditious work produced by him in early youth, which a bookseller, having casually obtained a copy of it, was now unfairly publishing, Lord Eldon said, in giving judgment, 'It is very true that, in some cases, it may operate so as to multiply copies of mischievous publications by the refusal of the court to interfere by restraining them; but to this my answer is, that sitting here as a judge, upon a mere question of property, I have nothing to do except with the *civil* interests of the parties; and if the publication be mischievous, it is not my business to interfere with it.'" (Southey *v.* Sherwood. 2 Meriv. 435; and see Lawrence *v.* Smith, 1 Jacob, 471; and Edinburgh Review, May, 1823; 2 Life of Lord Eldon, by Twiss, ch. lxiii.)

Lord Eldon refused an injunction to restrain the sale of a pirated edition of Lord Byron's "Cain," on the ground that it was a profane libel. (Murray *v.* Benbow, 1 Jac. 474, note, noticed with other cases in Phillips on Copyright, 23.) Lord Campbell in Lives of the Lord Chancellors, 255, criticises the decisions of Lord Eldon, refusing to protect the copyright in libelous

§ 417*e*. The courts will restrain, as a contempt of court, the publication of anything calculated to prejudice the case of the opposite party.[1] A defendant in a suit, a minister of the gospel, was restrained by injunction from publishing notice of an intended sermon on the subject of the suit then pending, and from preaching such sermon; on the ground that such sermon was a contempt of court.[2]

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publications. The courts interfere by injunction to restrain the publication of letters written by a party or his testator. (2 Story's Eq. Juris. §§ 943-949; Woolsey *v.* Judd, 11 How. Pr. R. 49; 4 Duer, 379; Resp. *v.* Duane, 1 Binney, 98; 2 Stark. Sland. 268, note 1.

[1] See *ante*, page 359, note 6; Merrill on Newspaper Libel, ch. iv. Libels as contempts of court.

[2] Markett *v.* Comm'rs of Hearne Bay, 24 Week. Rep. 845. In an unreported case (Meserole *v.* Goldsmith) decided January, 1870, in New York, Justice Ingraham interdicted the publication of a circular purporting to be the report of a trial relative to a patent right for paper collars. An injunction to restrain a fair report of proceedings in court was refused. (Riddell *v.* Clydesdale Horse Soc. 12 Co't of Sess. Cas. 976 [Scot.].)

PART III.

MALICIOUS PROSECUTION.

CHAPTER XVIII.

MALICIOUS PROSECUTION.[1]

Right of appeal to criminal tribunal—What is malicious prosecution—Distinction between malicious prosecution and false imprisonment—Essentials to a cause of action—Prosecution commenced—Terminated in favor of plaintiff—Conviction—Reasonable and probable cause—Advice of counsel—Not guilt or innocence, but knowledge and belief of prosecutor the question—Probable cause a question of law—Malice—Parties—Pleadings.

§ 418. We have now to consider that wrong by means of language termed a malicious prosecution. As heretofore stated, every one having reasonable and probable grounds for believing that a crime had been committed, has the right to communicate his belief to the magistrate having jurisdiction of such offense (§ 220). The existence of this right is essentially necessary to the efficient administration of the criminal law, and its exercise is to be encouraged rather than repressed.[2] Having reasonable and

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[1] For remarks upon the origin and history of the action for malicious prosecution, see Bigelow's Leading Cases on the Law of Torts, note to Malicious Prosecution; see, also, 1 American Leading Cases, Hare & Wallace, 200–224, 4th edit. See note to Heap *v.* Parrish (3 No. East. Rep. 552), citing a large number of cases, English and American, with references, under following heads:

Probable cause:
- Definition of.
- Want of.
- What amounts to.
- Belief of prosecutor.
- Discharge by justice or ignoring by grand jury.
- Discharge by *nolle pros.*
- Finding true bill by grand jury.
- Conviction by court of competent jurisdiction.
- Mixed question of law and fact.
- Practice.
- Intent.
- Advice of counsel.
- Advice of District Attorney.
- Advice of Justice of the Peace.
- Public officer.
- Defective process.

Malice, &c.

[2] "Actions for malicious prosecu-

probable cause for believing the accused guilty of the offense imputed confers this right, and the right is not tolled by being exercised maliciously.

§ 419. Attention has been heretofore directed to the difference between the right to appeal to a civil and the right to appeal to a criminal tribunal (§ 221).[1] An appeal

tion are looked upon with disfavor." (Savill *v.* Roberts, Carth. 416; Pantsune *v.* Marshall, Say. 162; Wanzer *v.* Wyckoff, 9 Hun, 179.) "Courts will be cautious how they discourage men from suing." (Goslin *v.* Wilcock, 2 Wilson, 302; Cardival *v.* Smith, 109 Mass. 158; and see Hurd *v.* Shaw, 20 Ill. 354.) "In general, however, every man is of common right entitled to prefer an accusation against a party whom he suspects to be guilty." (Chit. Cr. Law, 2.) In some cases it is not only the *right*, but it is the *duty* of one cognizant of the commission of a criminal offense to communicate his knowledge.

[1] In addition to the instances given (note 3, p. 331, *ante*), actions have been maintained for issuing an attachment (Brewer *v.* Jacob, 22 Fed. Rep. 217; Collins *v.* Shannon, 67 Wis. 441; Biering *v.* First Nat. B'k of Galveston, 69 Texas, 599; Brooks *v.* Sanger, 7 So. West. Rep. 355 [Texas]; Palmer *v.* Keith, 16 Neb. 91); for filing notice of *lis pendens* against real estate (Smith *v.* Smith, 20 Hun, 555; 56 How. Pra. Rep. 316); for restraining plaintiff by injunction (Lawton *v.* Green, 5 Hun, 157; Frame *v.* Sewing Machine Co. 31 Fed. Rep. 704); for arresting in a civil action (Ingraham *v.* Root, 51 Hun, 238; 21 N. Y. St. Rep. 192; Daniels *v.* Fielding, 16 M. & W. 200; Gibbons *v.* Allison, 3 C. B. 181; Petrie *v.* Lamont, 4 Sc. N. R. 335; Melia *v.* Neate, 3 Fost. & F. 757; Gibson *v.* Veasey, 15 Law Times, N. S. 586; Ray *v.* Law, Peters C. C. R. 207; Stokley *v.* Hornidge, 8 Car. & P. 11; Heywood *v.* Cellinge, 9 Ad. & El. 268; Zantzmayer *v.* Weightman, 2 Cranch C. Ct. 478; Breckenridge *v.* Auld, 4 *Id.* 731; Smith *v.* Cattel, 2 Wils. 376; Goslin *v.* Wilcock, *Id.* 302; Norrish *v.* Richards, 3 Ad. & El. 733; Newton *v.* Boodle, 9 Q. B. 948; Richardson *v.* Virtue, 4 Sup. Ct. Rep. [T. & C.] 441; Cuthbert *v.* Galloway, 35 Fed. Rep. 466); for arresting after debt paid (Tibbutt *v.* Holt, 1 Car. & K. 280); for bringing vexatious ejectment (Purton *v.* Honnor, 1 Bos. & P. 205); for refusing to consent to plaintiff's discharge from arrest (Moore *v.* Gardner, 16 M. & W. 595); for issuing execution against the person of plaintiff after he had been discharged under the insolvent act (Envart *v.* Jones, 3 Dowl. & L. 252; and see Yearsley *v.* Heane, 5 Dowl. & L. 265); for arresting one while privileged from arrest (Stokes *v.* White, 4 Tyr. 786; Magnay *v.* Burt, 5 Q. B. 381; Whalley *v.* Pepper, 7 C. & P. 506); for arresting for more than is due (DeMedina *v.* Grove, 10 Q. B. 152; Churchill *v.* Siggers, 3 El. & Bl. 929; Huffer *v.* Allen, Law Rep. 2 Ex. 15; Gilding *v.* Eyre, 10 C. B. N. S. 592; Wentworth *v.* Bullen, 9 C. B. 840); for causing one to be declared a bankrupt (see Farley *v.* Danks, 4 El. & Bl. 493: Brown *v.* Chapman, 3 Burr. 1418; Chapman *v.* Pickersgill, 2 Wils. 145; Whitworth *v.* Hall, 2 B. & Add. 695; Hay *v.* Weakley, 5 C. & P. 364; Atkinson *v.* Rawley, 3 G. & D. 611; Colton *v.* James, 1 B. & Adol. 128; Kemp *v.* King, Car. & M. 396; Quartz Hill Gold Mining Co. *v.* Eyre, 11 Q. B. D. 674); for maliciously rendering in discharge of bail (Porter *v.* Weston, 5 Bing. N. C. 715); for procuring one to be outlawed (Drummond *v.* Pigon, 7 C. & P. 228); for an unlawful distress (Stevenson *v.* Newnham, 13 C. B. 285; Grau *v.* Morgan, 1 Hodges, 398); for issuing a commission of lunacy (Turner *v.* Turner, Gow, 50; and see Lockenour *v.* Sides, 57 Ind. 360; Ayres *v.* Russell, 50 Hun, 283; Carr

to a criminal tribunal may involve the defamation of the accused, his arrest, his being held to bail, or imprisoned, and the expense of his defense.[1] Ordinarily a civil action involves the defendant merely in the costs of his defense, and in civil actions, with rare exceptions, the award of costs to the defendant is the only penalty to which the plaintiff is subjected for having made an unfounded complaint. But where, in a civil action, the defendant is held to bail, or imprisoned, he has, under certain circumstances, a remedy by action, and such an action is usually denominated an action for "malicious prosecution."[2] Without

v. Torre, 54 Law Times, N. S. 516); for suing out a writ of extent (Craig *v.* Hasell, 3 G. & B. 299; 4 Q. B. 481); for instituting proceedings for forcible entry and detainer (Pope *v.* Pollock, 46 Ohio St. ——); for foreclosing a mortgage (Marable *v.* Mayer, 3 So. East. Rep. 429); for libeling a vessel (Chambers *v.* Upton, 34 Fed. Rep. 474; Redway *v.* McAndrew, L. R. 9 Q. B. 74); for conspiring to have one indicted for trespass (Norris *v.* Palmer, 2 Mod. 51); for suing for libel in a court not having jurisdiction (Eldred *v.* Fawdrey, 16 N. Y. St. Rep. 83); malicious prosecution of civil action. (McPhearson *v.* Runyon, 40 Alb. L. J. 403); for proceeding for contempt (Bartlett *v.* Christhilf, 69 Md. ——); for vexatious suit for infringement of a patent (Clements *v.* Oderless Excavating Co. 67 Md. 461, 605); for vexatious proceedings to recover taxes (Brown *v.* City of Cape Girardeau, 2 So. West. Rep. 302); for rejecting a vote (Tozer *v.* Child, 6 El. & Bl. 289); against magistrate for malicious conviction (Burley *v.* Bethune, 1 Marsh. 220; 5 Taunt. 580; Glen *v.* Hall, 2 Hurl. & N. 379; 2 Law Jour. Rep. M. C. 78); for obtaining a search warrant (Boot *v.* Cooper, 1 T. R. 535; Leigh *v.* Webb, 3 Esp. 164; Elsee *v.* Smith, 1 D. & R. 28; Wyatt *v.* White, 5 H. & N. 371; Hope *v.* Evered, 17 Q. B. D. 386); distinction between malicious prosecution, properly so called, and action on the case for conspiracy, abuse of judicial process, &c. (Frierson *v.* Hewitt, 2 Hill [S. Car.], 499).

[1] The elements of the action are: "(1) Damage to a man's fame, as if the matter whereof he is accused be scandalous; (2) where a man is put in danger to lose his life or limb, or liberty; (3) damage to a man's property, as where he is forced to expend money in necessary charges to acquit him of the crime which he is accused" (Holt, C. J., Savile *v.* Roberts, 1 Ld. Raym. 374); or, (4) causes any [other] special damage. (*Id.*) "Wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself." (Platt, C. J., Chapman *v.* Pickersgill, 2 Wils. 145.)

[2] "The injury to the reputation is in many cases the gravamen of the action. An accusation of crime made under the forms of law, or on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases is by the action for malicious prosecution" (Rockwell *v.* Brown, 36 N. Y. 209); and in an action for malicious prosecution the plaintiff may recover not only for the unlawful arrest and imprisonment and expenses of his defense, but also for the injury to his

insisting that this is improper, we exclude such actions from our consideration, and confine ourselves exclusively to the action for making a criminal charge maliciously and without reasonable and probable cause.

§ 420. There is a fundamental distinction between a malicious prosecution and a false imprisonment. A malicious prosecution consists in merely making the complaint, leaving the officer to whom the complaint is made to determine what shall be done thereupon,[1] whereas a false imprisonment consists in the party complaining, himself determining what shall be done, as by arresting or demanding the arrest of the accused, without the intervention of an officer having power to decide whether such arrest is or is not proper to be made. False imprisonment is defined as an injury to the person, and malicious prosecution as an injury to the reputation.[2]

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reputation. (Sheldon *v.* Carpenter, 4 N. Y. 579.) Costs of defense are part of the damages (Rowlands *v.* Samuel, 11 Q. B. 39), and the personal physical suffering of the plaintiff while under arrest may be proved to enhance damages. (Abraham *v.* Cooper, 2 N. Y. Weekly Dig. 154; 81 Penn. St. 232; *contra*, Miles *v.* Weston, 60 Ill. 361.)

Distinction between action for malicious prosecution and an action for malicious arrest in a civil action. Injury to character is not an element in the latter; its essential ground being that the process of the law has been put in force maliciously, and without reasonable or probable cause. (2 Rob. Pr. 594; Broom Com. 738; Churchill *v.* Siggers, 3 Ell. & Bl. 937; Tancred *v.* Leyland, 16 Q. B. 669; De Medina *v.* Grove, 10 Q. B. 168; Henderson *v.* Jackson, 9 Abb. Pr. R. N. S. 301.)

[1] Where the acts of plaintiff amount to, or tend to amount to, a breach of the peace, a person giving him in charge is not liable for malicious prosecution. (Timothy *v.* Simpson, 1 C. M. & R. 757; Cohen *v.* Huskisson, 2 M. & W. 477; Wooding *v.* Oxley, 9 C. & P. 1; Ingle *v.* Bell, 1 M. & W. 516; Howell *v.* Jackson, 6 C. & P. 723; Price *v.* Seeley, 10 C. & F. 28.)

[2] *Ante*, § 200; 3 Black. Com. c. 8; 2 Bouv. Ins. 508, § 2239; Broom Com. 741, Eng. ed. 1869; Watson *v.* Hazzard, 3 Code R. 218; Martin *v.* Mattison, 8 Abb. Pr. R. 3; Hull *v.* Vreeland, 18 *Id.* 182; Henderson *v.* Jackson, 9 Abb. Pr. R. N. S. 290. Libel is on all fours with malicious prosecution. (Briggs *v.* Garrett, 111 Penn. St. 404.) While this parliament sat (A. D. 1383) an unjust charge was brought against Michael De la Pole of taking a bribe. He was acquitted, and John Cavendish, his accuser, was fined 1000 marks for defamation. (1 Camp. L'd Chanc. ch. xvi.) The distinction between an action for false imprisonment and an action for malicious prosecution is explained and illustrated by Lord Mansfield in Johnstone *v.* Sutton (1 T. R. 544), and by Justice Emott, in Brown *v.* Chadsey (39 Barb. 260; and see Farnham *v.* Feeley, 56 N. Y. 454; Von Lathan *v.* Libby, 38 Barb. 339; Austin *v.* Dowling, Law Rep. 5 C. P. 540; Teal *v.* Fissel, 34 Alb. L. J. 278.) A recovery

§ 421. The facts which constitute a cause of action for malicious prosecution are (1) that there has been a prosecution against the plaintiff, and which has occasioned damage to the plaintiff; (2) that the proceeding on such charge has terminated, and that, too, in favor of the plaintiff; (3) that the charge was without reasonable or probable cause; and (4) was malicious. All these requisites must exist, and the burden is upon the plaintiff to establish their existence.[1]

In actions for malicious prosecution, the statute of limitations begins to run from the time of the termination of the prosecution.[2]

§ 422. The first essential to a right of action for a malicious prosecution is, that there has been a prosecution against the plaintiff, and by a prosecution is here meant a complaint or charge made to a criminal tribunal. The complaint may be made orally or in writing, and it may charge (1) something which, if otherwise published, would confer a right of action, or (2) something which, if otherwise published, would not confer a right of action, unless followed by special damage, or (3) the complaint may be defective in form, or (4) the tribunal addressed may have no jurisdiction of the offense charged. And the complainant may content himself with simply making his complaint, leaving it altogether to the tribunal addressed to decide what shall be done thereupon, or he may go

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in an action for false imprisonment is *no* bar to an action for malicious prosecution. (Guest *v.* Warren, 9 Exch. 379.) A recovery in an action for malicious prosecution is a bar to an action for libel for the same accusation. (Tidwell *v.* Witherspoon, 21 Fla. 359; see *ante*, § 251.)

[1] Crescent Live Stock Co. *v.* Butchers' Union, 120 U. S. 141; *post*, § 426. As to notice of action under 24 & 25 Vict. ch. 96, see Green *v.* Hutt, 46 Law Times Rep. N. S. 888; Kine *v.* Evershed, 10 Q. B. 143; Jones *v.* Howell, 29 Law Jour. Ex. 19.

[2] Montreal *v.* Hall, Cassel's Digest, Supreme Court Decisions of Ontario, page 280. In New York the period of limitation for a personal injury, where not otherwise expressed, is six years. (N. Y. Code Civ. Pro. § 382.) Personal injury includes malicious prosecution (*Id.*; § 3343), and no period of limitation for malicious prosecution is expressly prescribed.

further and be officious in any proceedings which may ensue. The liabilities and rights of the party complaining, and of the party complained against, are materially affected by the foregoing circumstances.

The distinctions between oral and written language (§ 18), and of language actionable *per se*, and actionable only by reason of special damage (Chap. VIII), apply to the complaint, so that if the charge is such as if otherwise published would confer a right of action, in that case, the mere fact of making the charge, the other essentials to a cause of action (§ 421) existing, will confer a right of action for malicious prosecution.[1] But where the charge is such as if otherwise published would not confer a right of action unless special damage ensues, in that case no action lies for malicious prosecution, unless upon proof of special damage.[2] Now, special damage is the natural and proximate consequence of a wrongful act (§ 197), and, therefore, where a complaint, although not of itself sufficient to confer a right of action, does, as a natural and proximate consequence, occasion loss or injury to the accused, in that event he may, the other essentials to the action (§ 421) existing, maintain an action for malicious prosecution. The natural and proximate consequences of a complaint to a criminal tribunal, making a charge which amounts to a criminal offense, and of

[1] "To sustain the action of malicious prosecution, technically so called, the indictment must charge *a crime;* and then the action is sustainable *per se* on showing a want of probable cause." "There is another class of actions which are popularly called actions for malicious prosecutions, but they are *misnamed;* they are actions on the case, in which both a *scienter* and a *per quod* must be laid and proved." (O'Neall, J., Frierson *v.* Hewitt, 2 Hill [So. Car.], 499.)

[2] In Byne *v.* Moore, 5 Taunt. 187, the plaintiff, without being arrested, had been indicted for an *assault.* The bill was ignored by the grand jury. In an action for such prosecution as malicious and without probable cause, the plaintiff was nonsuited, and per Mansfield, Ch. J., "I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages because he clearly has not proved that he sustained any. I can understand the ground upon which an action shall be maintained for an indictment which contains scandal, but this contains none." The charge of assault was not actionable *per se.*

which the tribunal addressed has jurisdiction, is the arrest of the accused, which may or may not be followed with detention or imprisonment and cost of defense, and any one of these consequences is such damage or special damage as will confer a right of action.[1] This distinction between a complaint which is *per se* actionable, and one which is actionable only where special damage ensues, explains why some decisions hold that an arrest is, and others that an arrest is not, essential to a right of action.[2]

§ 422*a*. We shall consider hereafter (§ 432) who is responsible for making the complaint,[3] but it will be convenient here to consider who is responsible for what happens in consequence of the complaint, in those cases in which the complaint, of itself, does not confer a right of action. As in such case the right of action against the complainant depends upon the natural consequences of the act of complaining, if the complaint does not charge a crime—as, for instance, if the complaint amounts to a

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[1] Randall *v.* Henry, 5 Stew. & Port. 367. And if the charge is followed by the issue of a search warrant which is executed on plaintiff's premises, that is special damage, and will of itself support an action. (Elsee *v.* Smith, 1 D. & R. 97; Miller *v.* Brown, 3 Mo. 127.)

[2] Gregory *v.* Derby, 8 Car. & P. 749; Clarke *v.* Postan, 6 *Id.* 423; O'Driscoll *v.* M'Burney, 2 Nott & McC. 54; Lawyer *v.* Loomis, 3 Sup. Ct. Rep. (T. & C.) 393; Mayer *v.* Walter, 64 Penn. St. Rep. 283; Newfield *v.* Copperman, 15 Abb. Pr. Rep. N. S. 360, hold an arrest essential to a cause of action, and others, as Stapp *v.* Partlow, Dudley (Ga.), 176, that an arrest is not necessary. If no warrant issue, the remedy is slander in the form of "imposing the crime of felony." (Fuller *v.* Cook, 3 Leon. 100; Heyward *v.* Cuthbert, 4 McCord, 354.) An allegation that plaintiff was arrested, is satisfied by proof of a detainer. (Whalley *v.* Pepper, 7 C. & P. 506; Malone *v.* Huston, 17 Neb. 107.) An officer who had a writ against plaintiff, sent a message informing him of the fact, and asking him to come to the office and execute a bail bond, held not to amount to an arrest. (Berry *v.* Adamson, 6 B. & C. 528; but see Van Voorhes *v.* Leonard, 1 Sup. Ct. Rep. [T. & C.] 148.) An allegation that defendant caused plaintiff to be arrested and to be detained until, to procure his release, he procured bail, held not a divisible allegation, and not sustained by proof of giving bail. (*Id.*) An averment that plaintiff was detained until he found bail, is supported by proof of a detention only. (Bristow *v.* Heywood, 1 Stark. R. 48; s. c. Bristow *v.* Haywood, 4 Camp. 413.)

[3] Preferring a charge against a person which was never acted upon, insufficient to maintain an action for malicious prosecution. (Kneeland *v.* Spitzka, 42 N. Y. Superior Ct. 470.)

charge of *conversion* only—and the magistrate, of his own volition, erroneously issues a warrant for a felony, upon which the accused is arrested, such warrant and arrest are not natural consequences of the complaint, and for them the complainant is not liable,[1] although in such a case a right of action might exist against the magistrate. If, in the case just mentioned, the complainant had taken part in the arrest of the accused, as if he had personally delivered to the officer the warrant for the arrest of the accused, in that event he would have been liable to an action for a malicious prosecution, the arrest would have been a natural consequence of his act of delivering the warrant to the officer.[2]

A charge, the publication of which is otherwise actionable, is not the less so because published to a court having no jurisdiction, and therefore we find decisions to the effect that it is no defense that the court in which the prosecution was had was without jurisdiction,[3] probably where the charge is such as would give no right of action unless with special damage, the complain-

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[1] Leigh *v.* Webb, 3 Esp. Cas. 165; Tempest *v.* Chambers, 1 Stark. Rep. 67; and see Cohen *v.* Morgan, 6 D. & R. 8; Bartlett *v.* Brown, 6 R. I. 37; Carratt *v* Morley, 1 G. & D. 275; 1 Q. B. 18; M'Neely *v.* Driskill, 2 Blackf. 259; Crawford *v.* Ryan, 7 Atl. Rep. 745 (Pa.); Newman *v.* Davis, 58 Iowa, 447; Lea *v.* Charrington, 23 Q. B. D. 45; Hope *v.* Evered, 17 *Ib.* 338; see Teal *v.* Fissel, 28 Fed. Rep. 351; 34 Alb. L. J. 277; Bartlett *v.* Hawley, 38 Minn. 308; O'Brien *v.* Frazier, 47 N. J. 349; Thaule *v.* Krekeler, 81 N. Y. 432; Dennis *v.* Ryan, 65 N. Y. 385; Lock *v.* Ashton, 12 Q. B. 871; Brown *v.* Chapman, 6 C. B. 365; West *v.* Smallwood, 3 M. & W. 418.

[2] Johnson *v.* Daws, 5 Cranch C. C. 283; Collins *v.* Love, 7 Blackf. 416; Gibbs *v.* Ames, 119 Mass. 60. Although the fact that a magistrate has granted an illegal warrant may furnish ground for an action of trespass against the magistrate, it does not prevent an action for malicious prosecution being sustained against the person who procured the issuance of such warrant. (Elsee *v.* Smith, 1 D. & R. 97; 2 Chit. R. 304; Kline *v.* Shuler, 8 Ired. 484.) The criminal law amendment act makes it imperative on a magistrate to issue a warrant when *he is* satisfied that the act has been violated. A warrant under that act protects the prosecutor. (Lea *v.* Charrington, 23 Q. B. D. 45; aff'd *Id.* 272; Hope *v.* Evered, 17 Q. B. D. 338.)

[3] Morris *v.* Scott, 21 Wend. 281; Newfield *v.* Copperman, 15 Abb. Pr. R. N. S. 360: but see Braveboy *v.* Cockfield, 2 McMul. 270.

ant might not be responsible for acts of the court done without jurisdiction.

A charge, the publication of which is otherwise actionable, is not the less so because published in a complaint or an indictment which is defective in form,[1] or upon which, for some other reason, the accused could not have been convicted.[2]

§ 423. Except, perhaps, in the case of an *ex parte* exhibition of articles of the peace,[3] no action for a malicious prosecution can be maintained until after the prosecution alleged to be malicious has terminated,[4] otherwise the plaintiff might obtain judgment in the one case and yet be convicted in the other.[5] What is such a termination as will authorize the commencement of the action, is sometimes difficult to determine.[6] It was formerly held that a technical acquittal was indispensable,[7] and in a recent case the court said: "It was necessary to show the plaintiff's acquittal to lay a foundation for the action. He (plaintiff) could not proceed a step without it."[8] It is certain that the termination should be such as to furnish *prima facie* evidence that the prosecution was unfounded,[9] and was terminated on account of the plaintiff's innocence,[10] or at least was in favor of the

[1] Pippet *v.* Hearn, 5 B. & Ald. 634; Chambers *v.* Robinson, 2 Stra. 691; Wicks *v.* Fentham, 4 T. R. 247; Jones *v.* Gwynn, 10 Mod. 214; Parli *v.* Reed, 30 Kansas, 534.

[2] Pedro *v.* Barrett, 1 Ld. Raym. 81; Potter *v.* Gjertsen, 37 Minn. 386.

[3] Steward *v.* Gromett, 29 Law Jour. Rep. C. P. 170; 7 C. B. N. S. 191.

[4] Gillespie *v.* Hudson, 11 Kan. 163; O'Brien *v.* Barry, 106 Mass. 300; Cardival *v.* Smith, 109 Mass. 158; Glasgow *v.* Owen, 69 Texas, 167; Hall *v.* Fisher, 20 Barb. 441; Bell *v.* Matthews, 37 Kansas, 686.

[5] Fisher *v.* Bristow, 1 Doug. 215; Cardival *v.* Smith, 109 Mass. 158; O'Brien *v.* Barry, 106 Mass. 300.

[6] A criminal prosecution may be said to have terminated, (1) where there is a verdict of not guilty, (2) where the grand jury ignores a bill, (3) where a *nolle prosequi* is entered, or (4) where the accused has been discharged from bail or imprisonment. (Lowe *v.* Wartman, 47 N. J. L. R. 413.)

[7] Goddard *v.* Smith, 6 Mod. 262.

[8] Hogeboom, J., Miller *v.* Milligan, 48 Barb. 42, citing M'Cormick *v.* Sisson, 7 Cow. 715; Gorton *v.* DeAngelis, 6 Wend. 418.

[9] Wilkinson *v.* Howel, 1 Moo. & M. 495; Webb. *v.* Hill, 3 Car. & P. 485.

[10] Hains *v.* Elwell, 3 N. Jersey Law (2 Penn.), 411.

plaintiff.[1] It was formerly supposed that the termination must be such as would constitute a bar to a subsequent proceeding, but it seems that now a termination of the particular prosecution will suffice,[2] as if the grand jury fail to find a true bill,[3] or the indictment is quashed,[4] or in certain cases a *nolle prosequi* is entered,[5] or the complaint is dismissed by the magistrate[6] "in consequence of the complainant not appearing to prosecute at the time to which the case was adjourned,"[7] or a discharge by a

[1] Gorton *v.* De Angelis, 6 Wend. 418; Clark *v.* Cleveland, 6 Hill, 344; Hall *v.* Fisher, 20 Barb. 441; Salisbury *v.* Creswell, 14 Hun, 460; Gallagher *v.* Stoddard, 47 Hun, 101; 13 N. Y. St. Rep. 218.

[2] Clark *v.* Cleveland, 6 Hill, 347; Stanton *v.* Hart, 27 Mich. 539; Long *v.* Rogers, 17 Ala. 546; Brown *v.* Randall, 36 Conn. 56. The right to sue accrues whenever the criminal prosecution is disposed of in such a manner that it cannot be revived. (Casebeer *v.* Rice, 18 Neb. 203; Casebeer *v.* Drahoble, 13 Neb. 465.)

[3] Haupt *v.* Pohlmann, 16 Abb. Pr. R. 302; Rost *v.* Harris, 12 *Id.* 446; Morris *v.* Corson, 7 Cow. 281; McKown *v.* Hunter, 30 N. Y. 625; Weinberger *v.* Shelly, 6 Watts & S. 343; Stancliff *v.* Palmeter, 18 Ind. 321; Gilbert *v.* Emmons, 42 Ill. 143; Johnson *v.* Shove, 6 Gray (Mass.), 498. The failure of the grand jury to indict is not conclusive evidence of plaintiff's innocence. (Barber *v.* Gould, 20 Hun, 446.)

[4] Hays *v.* Blizzard, 30 Ind. 457.

[5] In Moulton *v.* Beecher, 1 Abb. N. C. 193, the complaint alleged that the prosecution had been terminated in plaintiff's favor by the entry of a *nolle prosequi* on motion of the district attorney, and by leave of the court made after consultation with the defendant, and at his request. On demurrer, it was held that this disclosed a sufficient termination of the proceeding. The report of the case contains the briefs of counsel on both sides. They are very elaborate, and probably refer to all the authorities upon the point. Entry of a *nolle pros.* by district attorney, without plaintiff's knowledge or consent, is a sufficient ending of the prosecution. (Murphy *v.* Moore, 10 Cent. Rep. 1877 [Pa.]; 11 Atl. R. 665.)

[6] Moyle *v.* Drake, 141 Mass. 238; Swensgaard *v.* Davis, 33 Minn. 368. Testimony of the justice, that he discharged plaintiff because in his opinion the evidence did not support the charge is not admissible. (Dempsey *v.* State, 16 So. West. Rep. 372 [Texas].) Nor is an entry on the justices' docket. (Casey *v.* Sevatson, 30 Minn. 516.)

[7] Fay *v.* O'Neill, 36 N. Y. 13, citing Clark *v.* Cleveland, 6 Hill, 344; Secor *v.* Babcock, 2 Johns. 203; Purcell *v.* Macnamara, 9 East, 361; Burhans *v.* Sanford, 19 Wend. 417; Watkins *v.* Lee, 5 M. & W. 270; see, also, Von Latham *v.* Rowan, 17 Abb. Pr. R. 238; Lawyer *v.* Loomis, 3 Sup. Ct. Rep. (T. & C.) 393; Garrison *v.* Pearce, 3 E. D. Smith, 255; Center *v.* Spring, 2 Clarke (Iowa), 393. Where a magistrate can neither acquit nor convict, but only bind over or discharge, and discharges the accused, that is a termination of the prosecution. (Driggs *v.* Burton, 44 Vt. 124; see Cardival *v.* Smith, 109 Mass. 158; Sayles *v.* Briggs, 4 Met. 421.) Where a criminal prosecution is commenced before a justice of the peace, and is afterwards dismissed with the intention of commencing it again in the District Court, and on the same day it is commenced in the District Court, held that such criminal prosecution before the justice of the peace cannot

magistrate having no jurisdiction to try but only to bind over,[1] or a discharge on *habeas corpus*,[2] a discharge by a United States commissioner acting as a magistrate,[3] or an acquittal for want of justification,[4] or for a variance,[5] or a defect in the indictment,[6] or complaint.[7] An appeal from the judgment of acquittal suspends the right to sue for malicious prosecution pending the appeal.[8]

The determination of the prosecuting officer never to bring the indictment to trial, on the ground that the charge was unfounded, is not a sufficient termination of the proceeding,[9] nor is the discharge of bail,[10] nor a compromise of the charge.[11]

The record is the only competent evidence of the determination of the prosecution.[12]

§ 424. As to entitle the plaintiff to maintain an action for a malicious prosecution, it is incumbent upon him to

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constitute the basis of an action for a malicious prosecution while the criminal prosecution is still pending in the District Court. (Schippel *v.* Norton, 38 Kan. 567.)

[1] Ames *v.* Rathbun, 37 How. Pr. R. 289; Foote *v.* Milbier, 1 Sup. Ct. Rep. (T. & C.) 456; Goodman *v.* Stroheim, 36 Superior Ct. Rep. (4 J. & S.) 216; Secor *v.* Babcock, 2 Johns. 203; Goodrich *v.* Warner, 21 Conn. 432; Smith *v.* Ege, 52 Penn. St. R. 419; Van Voorhes *v.* Leonard, 1 Sup. Ct. Rep. (T. & C.) 149; Connelly *v.* McDermott, 3 Lans. 63; Burlingame *v.* Burlingame, 8 Cow. 141; Farnam *v.* Feeley, 56 N. Y. 451; Sheldon *v.* Carpenter, 4 N. Y. 579; Carl *v.* Ayer, 53 N. Y. 14; Stevens *v.* Lacour, 10 Barb. 62; Gould *v.* Sherman, 10 Abb. Pr. R. 411; Burkett *v.* Lanata, 15 La. An. 337; Straus *v.* Young, 36 Md. 246.

[2] Swartwout *v.* Dickerman, 12 Hun, 358; *contra*, Zebley *v.* Storey, 10 Cent. Rep. 823.

[3] Vanderbilt *v.* Mathis, 5 Duer, 304.

[4] Morris *v.* Scott, 21 Wend. 281; Wood *v.* Sutor, 8 So. West. Rep. 51 (Texas).

[5] Wicks *v.* Fentham, 4 T. R. 247.

[6] Chambers *v.* Robinson, 2 Stra. 691; Dennis *v.* Ryan, 5 Lans. 350; Parli *v.* Reed, 30 Kansas, 534.

[7] Bell *v.* Keepers, 39 Kansas, 105.

[8] Palmer *v.* Avery, 41 Barb. 290; Howell *v.* Edwards, 8 Ired. Law (N. Car.), 516; Chelf *v.* Penn, 2 Metc. (Ky.) 463; Nebenzhal *v.* Townsend, 61 How. Pr. R. 353; 10 Daly, 232.

[9] Thomason *v.* DeMott, 18 How. Pr. Rep. 529; but see Kelly *v.* Sage, 12 Kansas, 109; Bell *v.* Matthews, 37 Kansas, 686.

[10] Bacon *v.* Townsend, 6 Barb. 426; Wood *v.* Graves, 144 Mass. 365; S. C. Wood *v.* Bailey, 11 No. East. Rep. 567; see § 433, *post*.

[11] Clark *v.* Everett, 2 Grant, 416; Mayer *v.* Walter, 64 Penn. St. R. 283; Gallagher *v.* Stoddard, 47 Hun, 101; 13 N. Y. St. Rep. 218; Van Voorhies *v.* Leonard, 1 Sup. Ct. Rep. (T. & C.) 148.

[12] Haynes *v.* Ware, 1 Vict. L. R. L. 272.

show a termination of the prosecution in his favor, it would seem *necessarily* to follow that where the accused was convicted of the charge, he cannot be heard to allege that the prosecution was without probable cause; yet it has been doubted whether a conviction is such conclusive evidence of probable cause as to bar an action for malicious prosecution.[1] "The true principle appears to be that a verdict of guilty is strong *prima facie* evidence, but capable of being rebutted," by showing it was obtained by corrupt or undue means.[2] On the other hand, it has been said that a conviction is conclusive evidence of probable cause, and that the reversal of the conviction does not change the rule;[3] and that to allow an action after conviction would, in effect, be allowing an appeal.[4] It may be that where the conviction has been before a magistrate or justice of the peace, and the conviction has been quashed on certiorari or appeal, that the conviction is not conclusive evidence of probable cause.[5]

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[1] 1 Am. Lead. Cas. 270, 5 ed.; citing Witham *v.* Gowen, 14 Maine, 362; Payson *v.* Caswell, 22 Maine, 212.

[2] Miller *v.* Deere, 2 Abb. Pr. Rep. 1; Burt *v.* Place, 4 Wend. 591; Olson *v.* Neal, 63 Iowa, 214; Bowman *v.* Brown, 52 Iowa, 437. A commitment for trial is *prima facie*, not conclusive, evidence of probable cause. (Haupt *v.* Pohlmann, 1 Robertson, 127; Ganea *v.* Railroad, 51 Cal. 140; Diemer *v.* Herber, 75 Cal. 287.) Plaintiff was indicted under § 4 of the newspaper libel act, though committed for trial and convicted under § 5; held, the conviction was no bar to an action for malicious prosecution. (Boaler *v.* Holder, 51 J. P. 277.)

[3] Whitney *v.* Peckham, 15 Mass. 243; Miller *v.* Deere, 2 Abb. Pr. Rep. 1; Crescent Live Stock Co. *v.* Butchers' Union, 120 U. S. 141, 151; Welch *v.* Boston & Prov. R. R. 14 R. I. 609.

[4] Basebee *v.* Matthews, Law Rep. 2 C. P. 684; Bacon *v.* Towne, 4 Cush. 217; Parker *v.* Huntington, 7 Gray, 37; Boyd *v.* Cross, 35 Md. 194; see Herman *v.* Brookerhoff, 8 Watts, 240; Jones *v.* Kirksey, 10 Ala. 139. To an action for maliciously and without probable cause informing against plaintiff for an offense, it is a good answer to say he was convicted and underwent his sentence without appealing. (Mellor *v.* Baddeley, 4 Tyrw. 962; 6 C. & P. 374; 2 C. & M. 675; and see Renehan *v.* Geriken, 1 Legal Notes, 267 [Quebec].)

[5] Witham *v.* Gowen, 14 Maine, 362; Burt *v.* Place, 4 Wend. 591; Mayer *v.* Walter, 64 Penn. St. Rep. 283; but see Reynolds *v.* Kennedy, 1 Wils. 232; Herman *v.* Brookerhoff, 8 Watts, 240; Labar *v.* Crane, 49 Mich. 561; Olson *v.* Neal, 63 Iowa, 214; Phillips *v.* Kalamazoo, 53 Mich. 33; Diemer *v.* Herber, 75 Cal. 287; Ganea *v.* So. Pac. R. R. Co. 51 Cal. 140.

§ 425. In order to ascertain when a prosecution is without reasonable and probable cause, it is necessary to inquire what is reasonable and probable cause? "The words '*probable cause*' have come to have a fixed meaning, and they mean reasonable ground for believing the party guilty; such reasons and such circumstances as would be convincing and satisfactory to right reason. If these grounds exist, and are brought to the notice of the prosecutor, and he acts upon them, he will be justified.[1] *So that upon the question of probable cause, it is not sufficient justification that the accused is in fact guilty; but, in addition to that, the prosecutor must believe in his guilt, and must have reasonable ground for such belief.*"[2] Probable cause is "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged."[3] "Such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, upon the facts within his knowledge, to believe that the person accused is guilty."[4] Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a *cautious* man in the belief that the person accused is guilty of the offense with which he is charged.[5] In a subsequent case,[6] Hogeboom, J., said he was not quite satisfied with this definition, and added: "If by *cautious* man is meant one of *ordinary* caution or prudence, the definition is well enough; but if it means anything more, I dissent from it." Again, it is said: Probable cause in general may be understood to be such conduct on

[1] Ganea *v.* So. Pac. R. R. 51 Cal. 140.

[2] Wanser *v.* Wyckoff, 9 Hun, 179, Dykman, J.

[3] Carl *v.* Ayers, 53 N. Y. 17. Bishop Butler has well said: "Probability is the guide of life."

[4] Heyne *v.* Blair, 62 N. Y. 22.

[5] Munns *v.* Dupont, 3 Wash. C. C. 37.

[6] Miller *v.* Milligan, 48 Barb. 40.

the part of the accused as may induce the court to infer that the prosecution was undertaken from public motives.[1] If one, by his folly or fraud, exposes himself to well-grounded suspicion of being guilty, there is probable cause for instituting a prosecution against him for the crime. It is not necessary to prove the crime on plaintiff to show probable cause.[2] Probable cause "is that apparent state of facts found to exist upon reasonable inquiry, that is, such inquiry as the given case rendered convenient and proper, which would induce a reasonably intelligent and prudent man to believe the accused person had committed in a criminal case the crime charged."[3] Probable cause is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty.[4]

To establish "probable cause" facts sufficient to induce belief in guilt of accused must have been known to defendant before making the charge.[5] "Probable cause" is the existence of such facts as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person accused is guilty.[6] If after the prosecution is commenced the prosecutor learns facts

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[1] Ulmer *v.* Leland, 1 Greenl. Rep. 138.

[2] Wilmarth *v.* Mountford, 4 Wash. C. C. 79.

[3] Lacy *v.* Mitchell, 23 Ind. 67; Burton *v.* St. Paul R. R. 33 Minn. 189.

[4] Bacon *v.* Towne, 4 Cush. 217; Harpham *v.* Whitney, 77 Ill. 42. It does not depend on the actual fact, but upon the reasonable belief of the prosecutor. (Phillips *v.* Waller, 5 Hawaiin R. 609; see Donnelly *v.* Burkett, 75 Iowa, 613; Casey *v.* Sevatson, 30 Minn. 516; Walker *v.* Kamp, 63 Iowa, 627; Murphy *v.* Martin, 58 Wis. 276; Mohar *v.* Simmons, 3 N. Y. St. Rep. 293; Young *v.* Lyall, 23 *Id.* 215; Paddock *v.* Watts, 116 Ind. 146.)

[5] Phillips *v.* Waller, 5 Hawaiin R. 609.

[6] Glasgow *v.* Owen, 69 Texas, 167. An instruction that "probable cause is the existence of such facts and circumstances as would excite in a reasonable mind a belief" in guilt, &c., is not erroneous in omitting the word "impartial," which was requested in connection with the word "reasonable," the words being nearly synonymous. (Thompson *v.* Beacon Valley Rubber Co. 56 Conn. 493.)

which induce a belief of the falsity of the charge perhaps the probable cause ceases.[1]

§ 426. Formerly the burden was on the defendant to show probable cause.[2] Savil *v.* Roberts[3] (A. D. 1699) is supposed to be the first case in which it was declared to be the duty of the plaintiff to prove the negative averment, the want of probable cause. The rule is now well established that the burden of proving want of probable cause is upon the plaintiff.[4] The want of reasonable and probable cause, sufficient to sustain the plaintiff's case, is so much a matter of fact in each individual case as to render it impossible to lay down any general rule on the subject, but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused,[5] or to enforce a civil right.[6] Prosecuting with any other motive than that of bringing a guilty person to justice is a malicious prosecution.[7] As

[1] Musgrave *v.* Newall, 1 M. & W. 582; Blank *v.* Atchison, &c. R. R. Co. 38 Fed. Rep. 311.

[2] Knight *v.* Jermin, Cro. Eliz. 134; Pain *v.* Rochester, Cro. Eliz. 871.

[3] 1 Salk. 13.

[4] Wheeler *v.* Nesbitt, 24 How. U. S. Rep. 544; Thaule *v.* Krekeler, 81 N. Y. 428; Hicks *v.* Faulkner, 8 Q. B. D. 167; aff'd 46 Law Times Rep. N. S. 127; Abrath *v.* N. East. R'way Co. 11 Q. B. D. 440; rev'g s. c. *Id.* 79; Walker *v.* So. East. R'y Co. L. R. 5 C. P. 640; Ganea *v.* So. Pac. R'way Co. 51 Cal. 140; Teal *v.* Fissel, 28 Fed. Rep. 351; Purcell *v.* Macnamara, 9 East, 361; Good *v.* French, 115 Mass. 201.

[5] Tindal, C. J., Willans *v.* Taylor, 6 Bing. 183. Evidence is admissible of hostility and unfriendly feeling entertained by defendant towards plaintiff prior to prosecution. (Bruington *v.* Wingate, 55 Iowa, 140.)

[6] Gallaway *v.* Burr, 32 Mich. 332; Thompson *v.* Beacon Valley Rubber Co. 56 Conn. 493; So. West. R. R. Co. *v.* Mitchell, 80 Ga. 438; Burton *v.* St. Paul, 33 Minn. 189; Williams *v.* McRavey, 6 Vict. Law Rep. 487. Defendant took an officer to plaintiff's home and threatened to dispossess her by a writ on a judgment of which he was assignee, against one not her privy in estate. Plaintiff threatened if the officer dispossessed her there would be trouble. Upon this defendant sued out a peace warrant against plaintiff. In an action for this as malicious prosecution, evidence that the deed under which plaintiff claimed was without consideration and intended to defeat the execution for possession held irrelevant. (Wright *v.* Church, 110 N. Y. 463; aff'g 30 Hun, 562.) It was also held that evidence was not admissible that defendant at the time of plaintiff's threat, knew of resistance to and the killing of officers shortly before in the vicinity, in the execution of writs on judgments similar to that which he was attempting to enforce. (*Id.*)

[7] Larocque *v.* Willett, 23 L. C. J. 184 Q. B.

where the prosecution was instituted with a view of terrifying persons from the commission of some particular offense.[1] The probable cause the want of which is required to be proved, relates to the cause for instituting the prosecution, probable cause for believing the accused guilty of the offense imputed to him.[2] "The want of probable cause must be substantially and expressly proved, and cannot be implied. . . . From the most express malice, the want of probable cause cannot be implied.[3] A man from a malicious motive may take up a prosecution for real guilt, or he may from circumstances which he really believes, proceed upon apparent guilt, and in neither case is he liable to this kind of action."[4] Neither a discharge by the magistrate before trial[5] nor an acquittal at the trial is alone evidence of want of probable cause,[6] nor is the entry of a *nolle prosequi*,[7] nor a compromise.[8] The acquittal on examination of a person who has been

[1] Stevens *v.* Midland Co. Railway Co. 10 Exch. 352; Lafontaine *v.* Boldere, 1 Legal Notes, 266 Quebec.

[2] Laird *v.* Taylor, 66 Barb. 139. The conduct of defendant must be weighed in view of what then appeared to him to be the acts and declarations of the accused, and not in the light of suhsequently appearing facts. (Atchison, T. & S. F. R. Co. *v.* Watson, 37 Kansas, 773.)

[3] Smith *v.* Austin, 49 Mich. 286.

[4] Johnstone *v.* Sutton, 1 T. R. 544; and see Mitchell *v.* Jenkins, 5 B. & Ad. 594; Willans *v.* Taylor, 6 Bing. 183. Want of probable cause cannot be inferred from *express* malice. (Hall *v.* Suydam, 6 Barb. 83; Murray *v.* McLane, 5 Hall Law Jour. 514; S. C. 2 Car. Law Rep. 187; Wheeler *v.* Nesbitt, 24 How. U. S. Rep. 544; Blunt *v.* Little, 3 Mason, 102; Wiggins *v.* Coffin, 3 Story, 1; Heyne *v.* Blair, 62 N. Y. 22.)

[5] Bruley *v.* Rose, 57 Iowa, 621.

[6] Baldwin *v.* Weed, 17 Wend. 224; Scott *v.* Simpson, 1 Sandf. 601; Vanderbilt *v.* Mathis, 5 Duer, 304; Griffin *v.* Chubb, 7 Texas, 603; Bell *v.* Pearcy, 11 Ired. 233; Wicks *v.* Fentham, 4 T. R. 247; McCrosson *v.* Cummings, 5 Hawaiin Rep. 391. An acquittal because of a defect in the indictment is no evidence of want of probable cause. (Pippet *v.* Hearn, 1 D. & R. 266.) Discharge and acquittal, after investigation before a magistrate, held *prima facie* evidence of a want of probable cause. (Straus *v.* Young, 36 Md. 246.) Plaintiff may prove his innocence of the charge preferred against him for the purpose of showing want of probable cause. (Long *v.* Rogers, 17 Ala. N. S. 540; Katterman *v.* Stitzer, 7 Watts, 189.)

[7] Roberts *v.* Bayles, 1 Sandf. 47; Parker *v.* Farley, 10 Cush. 279; see Gordon *v.* Upham, 4 E. D. Smith, 9; Yocum *v.* Polly, 1 B. Mon. 358.

[8] Clark *v.* Everett, 2 Grant, 416; Mayer *v.* Walter, 64 Penn. St. Rep. 283; Foshay *v.* Ferguson, 2 Denio, 617; Fagan *v.* Knox, 1 Abb. N. C. 246; S. C. Fagnan *v.* Knox, 66 N. Y. 528; McCormick *v.* Sisson, 7 Cow. 715; Burhans *v.* Sanford, 19 Wend. 417.

arrested and brought before a United States Commissioner is *prima facie* evidence of want of probable cause;[1] and so is the discontinuance of an action.[2] The defendant presented two bills for perjury against the plaintiff, but did not himself appear before the grand jury, and the bills were ignored. Afterwards the defendant presented a third bill, which on his own testimony was found. This prosecution he kept pending for three years, when the plaintiff took the record down for trial, the defendant, although in court and called upon, declining to appear as a witness. The plaintiff was acquitted; *Held*, there was *prima facie* evidence of want of probable cause.[3] But the mere failure on the part of the prosecutor to appear and prosecute is not of itself evidence of want of probable cause.[4] Where it appeared that plaintiff was employed by H. to work some timber into spars; before the work was completed H. assigned all his goods to defendant for the benefit of his creditors. At this time £19 remained due plaintiff for work done to that time. Plaintiff went to defendant's yard, where the spars were, and asked for them, and on defendant's foreman refusing to give them up, plaintiff next morning took them away, and his attorney wrote defendant's attorney that plaintiff claimed a lien on the spars. Defendant demanded the spars back; plaintiff refused to deliver them; defendant gave plaintiff into custody for stealing the spars; plaintiff asked defendant why he gave him into custody; defendant replied, "You had no right to take the spars away; I think you merely fetched them away to get what was your due." *Held*,

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[1] Jones *v.* Finch, 84 Vt. 204.

[2] Emmerson *v.* Cochran, 111 Pa. St. 619.

[3] Taylor *v.* Willans, 2 B. & Adol. 845; S. C. Willans *v.* Taylor, 6 Bing. 183; affi'd 3 M. & P. 350; see Purcell *v.* Macnamara, 9 East, 361; Wallis *v.* Alpine, 1 Camp. 204, note; Nicholson *v.* Coghill, 4 B. & C. 21; Brown *v.* Randall, 36 Conn. 56; Johnson *v.* Chambers, 10 Ired. 287; Braveboy *v.* Cockfield, 2 McMul. 270.

[4] Gorton *v.* De Angelis, 6 Wend. 418; Roberts *v.* Bayles, 1 Sandf. 47.

there was evidence of the absence of reasonable and probable cause.[1] In an action for a malicious prosecution, the charge having been for stealing a horse, left with a servant to show with a view to a sale, and the horse having been bought honestly and openly;—*Held*, that there was no reasonable cause.[2] The plaintiff was tenant to defendant, who resided in Wiltshire, of lands in Carmarthenshire, together with the exclusive right of sporting over defendant's lands adjacent. Plaintiff fished one of the ponds by cutting down the dam. D., defendant's local agent, suggested to plaintiff that he might fish a certain pond on the estate by cutting down the bank, which plaintiff accordingly did. Disputes afterwards arose between plaintiff and defendant. D. laid an information before a magistrate against plaintiff for unlawfully breaking down the dam and destroying the fish; and on D.'s testimony the magistrate held plaintiff to answer an indictment. A bill was preferred, but ignored. Defendant was not present at the hearing of the information, nor was there any evidence to show that he knew that D. had given the plaintiff permission. At the trial the jury found that D. had given permission, and that D. acted under defendant's authority in instituting the proceedings. *Held*, that, independently of the permission given by D., there was no reasonable or probable cause for instituting the proceeding.[3]

The defendant may rebut the evidence of want of probable cause by evidence of reasonable and probable cause,[4]

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[1] Huntley *v.* Simson, 2 Hurl. & N. 600.

[2] Stewart *v.* Beaumont, 4 Fost. & Fin. 1034.

[3] Michell *v.* Williams, 11 M. & W. 205. Where the prosecution was founded upon several charges or a divisible charge, an action may be maintained (other circumstances concurring) if one or some divisible part of the charge was without reasonable and probable cause. (Reed *v.* Taylor, 4 Taunt. 616; and see Ellis *v.* Abrahams, 8 Q. B. 709; Candler *v.* Petit, 2 Hall [N. Y.], 315; as to probable cause, see Cuthbert *v.* Galloway, 35 Fed. Rep. 466; R'road *v.* Watson, 37 Kansas, 773; Sweeney *v.* Perney, 19 Pac. Rep. 328.)

[4] Lunsford *v.* Deitrich, 86 Ala. 250. To show want of probable cause, it is not necessary to show that the prosecution was instituted through ill-will to defendant therein. (Southwest

and reasonable and probable cause may be shown by evidence of facts which would constitute a *prima facie* case against plaintiff, although the evidence might be insufficient to convict.[1] It is some evidence of probable cause that the jury failed to agree,[2] or paused before rendering a verdict of not guilty,[3] and so is the finding of a true bill by the grand jury.[4] But to rebut evidence of want of probable cause, defendant cannot prove the general bad reputation of the plaintiff.[5] Nor can a defendant give evidence that the general reputation of plaintiff was suspicious, and that his house had been searched on former occasions.[6] Defendant may show the bad reputation of plaintiff in mitigation of damages.[7]

R. Co. *v.* Mitchell, 80 Ga. 438.) Evidence of the good character of plaintiff is admissible as tending to show want of probable cause. (Woodworth *v.* Mills, 61 Wis. 44.)

[1] Dawson *v.* Van Sandau, 11 Weekly Rep. 516. Defendant may show by district attorney what was his, defendant's, testimony before the grand jury. (Avery *v.* Blair, 105 N. Y. 669; memorandum only, reported 8 Cent. Rep. 778; rev'g S. C. 21 Week. Dig. 178.) Plaintiff may give evidence of acts of defendant to deprive plaintiff of the means of disproving the charge made against him. (Edgall *v.* Francis, 1 Sc. N. R. 118; Silkman *v.* Crosby, 14 N. Y. St. Rep. 594.) Evidence of what the magistrate said in disposing of the charge is not admissible on the question of reasonable and probable cause. (Barker *v.* Angell, 2 M. & Rob. 371; Wetzlar *v.* Zachariah, 16 Law Times, N. S. 432; Richards *v.* Turner, Car. & M. 414; Hickey *v.* O'Keefe, 8 Vict. Law Rep. L. 400; *contra*, see Edden *v.* Thorniloe, 6 Jur. 265.)

[2] Johnson *v.* Miller, 63 Iowa, 529; but see Spalding *v.* Lowe, 56 Mich. 356.

[3] Smith *v.* Macdonald, 3 Esp. 7. Disagreement of jury is *prima facie* evidence of probable cause. (Johnson *v.* Miller, 63 Iowa, 529; on rehearing, 19 No. West. Rep. 310.)

[4] Brown *v.* Griffin, Cheves, 32. Defendant cannot prove by a grand juror that the grand jury hesitated about returning "no bill," and that eight jurymen were in favor of finding an indictment. (Scotten *v.* Longfellow, 40 Ind. 23.)

[5] Oliver *v.* Pate, 43 Ind. 132. A recognizance executed by plaintiff reciting that there appeared to the justice probable cause for believing plaintiff guilty, which had never been filed, is no evidence of probable cause. (Van de Wiele *v.* Callanan, 7 Daly, 386.) Plaintiff may prove his good reputation and defendant's knowledge thereof as showing want of probable cause. (Blizzard *v.* Hays, 46 Ind. 166; see Tait *v.* Snewin, 5 Vict. Law Rep. L. 374.)

[6] Newsam *v.* Carr, 2 Stark. Rep. 69; see Edgworth *v.* Carson, 43 Mich. 241. Where defendant gave evidence of probable cause, defendant was allowed to prove plaintiff a man of notoriously bad character. (Rodriguez *v.* Tadmire, 2 Esp. 72.) But since held that defendant cannot cross-examine as to bad character of plaintiff, nor as to previous charges against him. (Downing *v.* Butcher, 2 Moo. & Rob. 374.)

[7] O'Brien *v.* Frasier, 47 N. J. L. R. 349; Rosenkrans *v.* Barker, 115 Ill. 331; *contra*, Walker *v.* Pittman, 108 Ind. 341.

§ 427. Under certain conditions it is sufficient evidence of reasonable and probable cause that the defendant in what he did acted under the advice of *reputable*[1] counsel. The conditions upon which this defense is available are, that the defendant honestly sought the advice of counsel to direct his action and not to cloak his malice,[2] and that, *prior* to receiving advice, he fully and fairly stated to counsel all the facts of *the* case, so far as known to him; and what were the facts so stated must be shown.[3] Nor is a defendant deprived of the

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[1] Advice of "pettifogger" no defense (Stanton *v.* Hart, 27 Mich. 539): nor is the advice of a justice of the peace (Burgett *v.* Burgett, 43 Ind. 78; Rigdon *v.* Jordan, 7 So. East. Rep. 857 [Ga.]); or of one who holds himself out as a licensed lawyer, but is not so in fact. (Murphy *v.* Larson, 77 Ill. 172.) To admit evidence of advice of counsel is going a good way. (Blunt *v.* Little, 3 Mason, 102.) "We do not feel at liberty to carry it further by admitting testimony of the opinion of any gentleman, however reputable, who has not qualified himself for giving advice upon questions of law by studying it as a science and pursuing it as a profession." (Beal *v.* Robeson, 8 Ired. 276.) Advice of counsel a defense. (See Mesher *v.* Iddings, 72 Iowa, 553; Blunk *v.* Atchison, T. & S. F. R. Co. 38 Fed. Rep. 311; Moore *v.* North. Pac. R. R. Co. 37 Minn. 147; Donnelly *v.* Burkett, 75 Iowa, 613; Acton *v.* Coffman, 74 Iowa, 17; Glasgow *v.* Owen, 69 Texas, 167; St. Johnsbury & L. C. R. Co. *v.* Hunt, 59 Vt. 294; Smith *v.* Walter, 125 Pa. St. Rep. 453; Paddock *v.* Watts, 116 Ind. 146; note to Norrel *v.* Vogel, 38 No. West. Rep. 705; Manning *v.* Finn, 23 Neb. 511; and note to Chambers *v.* Upton, 34 Fed. Rep. 474.)

Advice of county attorney a defense. (Bartlett *v.* Hawley, 37 No. West. Rep. 583, and note; Shippell *v.* Norton, 38 Kans. 567; Johnson *v.* Miller, 63 Iowa, 529.) Advice of State attorney general a defense. (Gilbertson *v.* Fuller, 42 No. West. Rep. 203 [Minn.].) Acting under advice of counsel is not conclusive of probable cause. (Gulf, C. & S. F. R'y Co. *v.* James, 10 So. West. Rep. 744.) Advice of counsel no defense because defendant did not state all the facts to counsel. (Donnelly *v.* Daggett, 145 Mass. 314; Logan *v.* Maytag, 57 Iowa, 107; Porter *v.* Knight, 63 Iowa, 365; Manning *v.* Finn, 23 Neb. 511; Cuthbert *v.* Galloway, 35 Fed. Rep. 466; Comtement *v.* Cropper, 6 So. Rep. 127 [La.].)

[2] Fisher *v.* Forrester, 33 Penn. St. R. 501; and see Skidmore *v.* Bricker, 77 Ill. 164; Galloway *v.* Stewart, 49 Ind. 156; Cole *v.* Curtis, 16 Minn. 182; Sharpe *v.* Johnston, 59 Mo. 557; St. Johnsbury & L. C. R. R. Co. *v.* Hunt, 59 Vt. 294; Chambers *v.* Upton, 34 Fed. Rep. 474.

[3] Stanton *v.* Hart, 27 Mich. 539; Wicker *v.* Hotchkiss, 62 Ill. 107; Blunt *v.* Little, 3 Mason, 102; Center *v.* Spring, 2 Iowa, 403; Potter *v.* Seale, 8 Cal. 217; Bliss *v.* Wyman, 7 Cal. 257; Manning *v.* Finn, 23 Neb. 511; Cuthbert *v.* Galloway, 35 Fed. Rep. 466; Norrel *v.* Vogel, 38 No. West. Rep. 705; Paddock *v.* Watts, 116 Ind. 146. Where a collector, by advice of the U. S. district attorney, instituted a suit against plaintiff, held such advice was probable cause. (Murray *v.* McLane, 2 Car. Law Repos. 186; and see Laughlin *v.* Clawson, 27 Penn. St. R. 330.) Laying the facts before a justice of the peace and acting on his advice in causing the arrest is no

benefit of this defense by the fact that the advice was erroneous.[1] If the defendant acted *bona fide* on the advice received, it is a defense.[2] But it has been said: "Advice of counsel will not of itself protect a client from the imputation of malice. To enable it to have that effect the question must be one of law, or some legal principle must be involved, in order to a proper decision of which the law applicable to the question must be ascertained. In such a case, if the client acts in good faith upon the advice of counsel learned in the law, he cannot be charged with malice."[3]

§ 428. The question of probable cause does not turn upon the actual guilt or innocence of the plaintiff.[4] The guilt or innocence was the issue in the prosecution of which the plaintiff complains, and where, after the termination of that prosecution in his favor, he sues for

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defense. (Gee *v.* Culver, 13 Oregon, 598.)

[1] Richardson *v.* Virtue, 2 Hun, 208; 4 Sup. Ct. (T. & C.) 441; Hall *v.* Suydam, 6 Barb. 83; Stone *v.* Swift, 4 Pick. 389; Hewlett *v.* Cruchley, 5 Taunt. 277. In an action against A. for malicious prosecution, defendant's attorney proved that he instituted the prosecution by the order of a city alderman; Held that defendant's counsel might ask the witness, the attorney, whether defendant had desired him not to prosecute on his, defendant's, behalf, but not ask him what defendant had said to him on the subject of the prosecution. (Osterman *v.* Bateman, 2 C. & K. 728.)

[2] Ravenga *v.* Mackintosh, 2 Barn. & Cr. 693. As to when advice of counsel is not a protection, see Crescent Live Stock Co. *v.* Butchers' Union, 120 U. S. 141, 154.

[3] Mullin, J., Laird *v.* Taylor, 66 Barb. 143. If it appears to the jury that the suit was malicious notwithstanding the advice of counsel, that fact is no protection to the defendant, and if the court can see that notwithstanding the advice, it was unreasonable to believe that a ground existed, that fact does not constitute probable cause. (Brewer *v.* Jacobs, 22 Fed. R. 217.) Advice of counsel is referable rather to the issue of malice than the want of probable cause. (*Id.*)

[4] Carl *v.* Ayers, 53 N. Y. 17; Hall *v.* Suydam, 6 Barb. 83; Foshay *v.* Ferguson, 2 Denio, 619; Wanser *v.* Wyckoff, 16 Sup. Ct. Rep. (9 Hun), 179; Scanlan *v.* Cowley, 9 Abb. Pr. Rep. 94; Siebert *v.* Price, 5 Watts & S. 438; Swaim *v.* Stafford, 3 Ired. 289; 4 *Id.* 392; Sharpe *v.* Johnston, 50 Mo. 557. Held error to lead the jury to infer that the guilt or innocence of the plaintiff of the charge was a question in the cause. (Fisher *v.* Forrester, 33 Penn. St. R. 501.) The question of guilt only bears on the question of probable cause. (Thompson *v.* Beacon Valley Rubber Co. 56 Conn. 493.) Probable cause is a good defense, although plaintiff was innocent. (Wilson *v.* King, 39 N. Y. Superior Co't, 384; Burley *v.* Bethune, 1 Marsh, 220; 5 Taunt. 580; see Simmonds *v.* Brinkmeyer, 72 Cal. 486.)

damages, on the ground that the prosecution was without probable cause, it is a defense to allege that in fact the plaintiff was guilty.[1] Nor does the question of probable cause turn upon a consideration of what were the facts of the case, but upon a consideration of what were the facts as they appeared to, or were known by, or were believed to be by the defendant.[2] The controlling fact is not was there reasonable and probable cause for the prosecution, but had the defendant, at the time of instituting the prosecution, reasonable and probable cause for so doing. One who makes a charge or institutes a prosecution which at the time he knows to be unfounded, acts without reasonable or probable cause.[3] In an action for maliciously prosecuting the plaintiff for perjury, the judge charged: "That . . . if defendant, *at the time* he preferred the indictment, acting upon information he had received, believed, and had reasonable grounds for believing, that plaintiff had sworn falsely, then there was reasonable and probable cause for preferring the indictment; but if defendant, *at the time* he preferred the indictment, did not believe the information he had received to be true, but, in his own mind, believed, and had reasonable ground to believe, that plaintiff had not sworn falsely, or, still more, if he believed that plaintiff had spoken the truth, then there was no reasonable or probable cause for the prosecution;" held correct.[4] Where the prosecution is for larceny, the

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[1] If jury satisfied that plaintiff was guilty of the crime charged, no recovery can be had. (Parkhurst *v.* Mastellar, 57 Iowa, 474; Turner *v.* Dinnegar, 20 Hun, 465; see Delegal *v.* Highley, 3 Bing. N. C. 950.) Where plaintiff was acquitted, and on the trial of the action for the prosecution as malicious testifies to his innocence, and the only evidence of probable cause is that of defendant and his agent, the question of probable cause should be submitted to the jury. (Gierhon *v.* Ludlow, 6 N. Y. Supp. 111.)

[2] James *v.* Phelps, 11 Adol. & El. 483; Gallaway *v.* Burr, 32 Mich. 332; Plummer *v.* Johnson, 70 Wis. 131.

[3] Casebeer *v.* Rice, 18 Neb. 203.

[4] Heslop *v.* Chapman, 23 Law Jour. Rep. N. S. 49 Q. B.; affirming S. C. Hadrick *v.* Heslop, 12 Q. B. 267; and see Paddock *v.* Watts, 116 Ind. 146.

knowledge of defendant that the plaintiff claimed to own the property he was accused of stealing, and had a *prima facie* right to it, is evidence of want of probable cause.[1] In an action for a malicious prosecution for sheep stealing, it appeared at the trial that plaintiff was possessed of a sheep which defendant claimed as one of a lot stolen from him. Plaintiff gave an account of the way he became possessed of it, which, if the sheep was the defendant's, must have been willfully false. The defendant took away the sheep. The plaintiff sued him for so doing in the county court. To stop the action, the defendant indicted the plaintiff, who was acquitted. There was evidence both ways, but it appeared that the sheep really never was the defendant's, though he *bona fide* believed it was. The judge, assuming these facts to be true, asked the jury if the defendant had reasonable grounds for his belief. On their finding that he had, he ruled that there was reasonable and probable cause for the indictment. Held, by Coleridge and Crompton, JJ., that the finding of the jury on that one point, in addition to the facts beyond dispute, made out a complete case of reasonable and probable cause, and, therefore, that the judge was right. Earle, J., *dissentiente*.[2] Although the facts known to the prosecutor may make out a *prima facie* case of guilt against the plaintiff, yet if the prosecutor does not believe the plaintiff to be guilty, he acts without reasonable and probable cause.[3] But while it is necessary to a probable cause for a prosecution that the prosecutor should believe in the guilt of the accused, a belief in the guilt of the accused, however

[1] Weaver *v.* Townsend, 14 Wend. 192. Possession of recently stolen property is probable cause for believing the possessor guilty of larcency. (McDonald *v.* Atlantic & Pac. R. Co. 21 Pac. Rep. 338 [Ariz.].)

[2] Douglas *v.* Corbett, 6 El. & Bl. 511.

[3] Turner *v.* Ambler, 10 Q. B. 252; Broad *v.* Ham, 5 Bing. N. C. 722; 8 Sc. 40; Fagan *v.* Knox, 1 Abb. N. C. 193; S. C. Fagnan *v.* Knox, 66 N. Y. 528; Henton *v.* Heather, 14 M. & W. 131.

honestly entertained, will not alone constitute a defense. To constitute a defense, there must be a belief founded upon knowledge or information which renders such a belief reasonable.[1] It is not enough to show that the case appeared sufficient to this particular person, but the case must be sufficient to induce a sober, sensible and discreet person to act upon it, or it must fail as a justification for the proceeding upon general grounds.[2]

Where the defendant is the prosecutor, his mere belief in the guilt of the accused is not probable cause;[3] yet where the defendant was not the prosecutor in fact, and can be made so only by construction, by reason of his having given information which led to plaintiff's arrest, the *motive* is material, and the mere fact that defendant acted in good faith is a defense.[4]

§ 429. To constitute reasonable and probable cause, a prosecutor need not necessarily have personal knowledge of the transaction of which he complains; he may rightfully act upon information communicated to him in the ordinary routine of business, where he honestly believes

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[1] 1 Amer. Lead. Cas. 281; cited and approved, Dennis *v.* Ryan, 63 Barb. 149; 5 Lans. 350; Farnam *v.* Feeley, 56 N. Y. 456. It is error to leave to jury the question whether defendant honestly and reasonably believed, &c., a belief may be honest though unreasonable. (Lowe *v.* Collum, 2 Ir. L. R. 15. Honest belief is reasonable cause. (Hicks *v.* Faulkner, 8 Q. B. D. 167; aff'd 46 Law Times, N. S. 127.)

[2] Redfield, Ch. J., Barron *v.* Mason, 31 Vt. 197.

[3] 1 Amer. Lead. Cas. 265; Merriam *v.* Mitchell, 13 Me. 439; Travis *v.* Smith, 1 Barr (Pa.), 234; Burlingame *v.* Burlingame, 8 Cow. 141; Hall *v.* Suydam, 6 Barb. 84; Shafer *v.* Loucks, 58 Barb. 426; Huffer *v.* Allen, Law Rep. 2 Ex. 15. Defendant must, at the time he prosecutes, know the circumstances upon which he relies as constituting probable cause. (Carl *v.* Ayers, 53 N. Y. 17; Galloway *v.* Stewart, 49 Ind. 156.) Defendant had indicted plaintiff for felony, for maliciously obstructing the air-way of a mine, but which it appeared plaintiff did *bona fide* under a claim of right. In an action by plaintiff for a malicious prosecution, held that it ought to have been left to the jury to say whether defendant knew that the obstruction had been done under a claim of right, for that, if so, there was no probable cause for the indictment. (James *v.* Phelps, 3 Per. & Dav. 231; 11 A. & El. 483; and see Scanlan *v.* Cowley, 9 Abb. Pr. R. 94; 2 Hilton, 489; citing Gordon *v.* Upham, 4 E. D. Smith, 9; Baldwin *v.* Weed, 17 Wend. 224; Munns *v.* Dupont, 3 Wash. C. C. 37.)

[4] Farnam *v.* Feeley, 56 N. Y. 451; see Woodworth *v.* Mills, 61 Wis. 44.

such information to be true, and the information is of such a character, and is communicated in such a manner as, under similar circumstances, it would be acted upon by a business man of ordinary prudence.[1] And where it appears that the prosecutor acted upon information, the presumption is that he believed in the truth of such information, and in the absence of any evidence that one who acted upon information knew, or had reason to suspect, the information to be false, it was held error to charge the jury that, to justify the defendant's acts, they must be satisfied—*i. e.*, satisfied by something more than the presumption in his favor—that he believed in the truth of the information upon which he acted.[2] A prosecutor may act upon appearances, and if the apparent facts are such as would lead a discreet and prudent person to the belief that the accused had committed a crime, they constitute reasonable and probable cause, although the accused is in fact innocent.[3] But even where the appearances against the accused are suspicious, if the prosecutor has knowledge of facts which will explain the suspicious circumstances, and exonerate the accused from a criminal

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[1] Gallaway *v.* Burr, 32 Mich 332; Lamb *v.* Galland, 44 Cal. 609; Chatfield *v.* Comerford, 4 Fost. & F. 1008; Lister *v.* Perryman, Law Rep. 4 Ho. of L'ds, 521; Miller *v.* Milligan, 48 Barb. 30.

[2] Carpenter *v.* Shelden, 5 Sandf. 77. It is an essential element of the defense that defendant honestly believed plaintiff was guilty of the offense charged. (Spear *v.* Hiles, 67 Wis. 350.) Two persons told defendant a consistent and not improbable story clearly bringing the crime home to plaintiff; held, defendant was justified in setting the law in motion, without making inquiry into the character of his informants. (Robbins *v.* David, 5 Vict. L. R, L. 163.) Where stolen goods were found in plaintiff's possession, and he stated he received them from A. who was accessible; held, defendant should have applied to A. before prosecuting plaintiff. (Jenner *v.* Harbison, 5 Vict. Law Rep. L. 111.) The bare fact that certain persons had stated to defendant they believed plaintiff had committed the crime, does not tend to justify the prosecution. (Norrel *v.* Vogel, 38 No. West. R. 705 [Minn.]; but see Turner *v.* Wright, 6 Vict. Law Rep. L. 273.) Plaintiff may show that defendant knew his informant was a disreputable person. (McIntire *v.* Levering, 20 No. East. Rep. 191; see Chapman *v.* Dunn, 56 Mich. 31.) Defendant making inquiries to ascertain the facts is evidence of good faith. (Rigdon *v.* Jordan, 7 So. East. Rep. 857.)

[3] Fagan *v.* Knox, 1 Abb. N. C. 246; s. c. Fagnan *v.* Knox, 66 N. Y. 528; Carl *v.* Ayers, 53 N. Y. 14.

charge, he acts without reasonable and probable cause.[1] Mere suspicion is not probable cause.[2] Defendant had a sick child on board a steamboat. He was approached by plaintiff, a stranger, who touched him on the shoulder, and said he wished to speak with him. Plaintiff being roughly answered, turned away, and then turned back stating to defendant he intended to speak with him concerning his child. Whereupon defendant caused plaintiff's arrest on a charge of an attempt to steal his, defendant's, diamond breast-pin—held there was no probable cause for the arrest.[3] A. committed a robbery and immediately absconded. Plaintiff, a fellow-workman of A., stated that A. had informed him of his intention to go to Australia; and A. had been seen the morning after the robbery, coming from a public entry leading to the place where the robbery was committed. Defendant, plaintiff's employer, on learning these facts, caused plaintiff to be arrested on a charge of robbery—held there was no evidence of probable cause.[4] Defendant, a miller, saw some sacks partly covered with a tarpaulin, lying on a quay, alongside a vessel; seeing his mark on one of the sacks, he opened it, and found it filled with pieces of sacks, old and new. He found also sacks on which was his mark, and some from which his mark had been cut. He learned that plaintiff was about shipping these sacks to a paper-mill. Defendant caused plaintiff's arrest for having stolen goods in his possession, but the charge was dismissed. In an action for malicious prosecution, held there was reasonable and probable cause.[5]

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[1] Fagan *v.* Knox, 1 Abb. N. C. 246; 66 N. Y. 528; Peden *v.* Mail, 118 Ind. 560. Similarity of handwriting is not *per se* and without other circumstances probable cause for preferring a charge of forgery against one whose handwriting resembles that of the forged instrument. (Clements *v.* Ohrly, 2 C. & K. 686; Heyne *v.* Blair, 62 N. Y. 19; rev'g s. c. 3 Sup. Ct. Rep. [T. & C.] 264.)

[2] Busst *v.* Gibbons, 30 Law Jour. Rep. Ex. 75.

[3] Carl *v.* Ayers, 53 N. Y. 14.

[4] Crescent Live Stock Co. *v.* Butcher Union, 120 U. S. 141; Busst *v.* Gibbons, 30 Law Jour. Rep. Ex. 75.

[5] Wyatt *v.* White, 5 Hurl. & N. 371.

The owner in fee of certain premises mortgaged them to the defendant, and afterwards let the mortgaged premises to the plaintiffs. The plaintiffs occupied the premises as a storehouse. Afterwards defendant, without notice to or knowledge of the plaintiffs, and while they were absent from the premises, obtained possession by removing the lock of the outer door. When plaintiffs became aware of this, they endeavored to eject defendant; and on failure to do so, effected an entrance at a side window and held possession against defendant. Defendant procured plaintiffs to be indicted for a forcible entry, upon which they were tried and acquitted—held there was reasonable and probable ground for the prosecution.[1] Plaintiff was in possession of horses, under a contract of hiring from defendant prohibiting him from removing them from his farm; he had offered them for sale in Victoria and in another colony—held there was reasonable and probable cause for instituting a prosecution for larceny as bailee.[2]

§ 430. The facts being undisputed. What is reasonable and probable cause is a question of law.[3] It is always for the court to define what is reasonable and probable cause, and besides defining the law, explain its application to the

[1] Lows *v.* Telford, Law Rep. 1 Appeal Cas. 414; see Krulevitz *v.* East. R. R. Co. 140 Mass. 573; 143 *Id.* 231.

[2] Playford *v.* Brown, 6 Vict. Law Rep. L. 467.

[3] Bulkeley *v.* Keteltas, 6 N. Y. 384; Miller *v.* Milligan, 48 Barb. 30; Busst *v.* Gibbons, 30 Law Jour. Rep. Ex. 75; Watson *v.* Whitmore, 14 *Id.* 41; Hailes *v.* Marks, 7 H. & N. 56; Carpenter *v.* Shelden, 5 Sandf. 77; Gordon *v.* Upham, 4 E. D. Smith, 9; Waldheim *v.* Sichel, 1 Hilton, 45; Good *v.* French, 115 Mass. 201; Porter *v.* White, 4 Central Reporter, 151; Coleman *v.* Allen, 5 So. East. Rep. 205, note; Bartlett *v.* Hawley, 38 Minn. 308; Sartwell *v.* Parker, 141 Mass. 405; Turner *v.* O'Brien, 11 Neb. 108; Gilbertson *v.* Fuller, 42 No. West. Rep. 203 (Minn.); Moore *v.* No. Pac. R'd Co. 37 Minn. 147; Williamson *v.* M'Ravey, 6 Vict. Law Rep. L. 487; McNulty *v.* Walker, 64 Miss. 198; Bell *v.* Keepers, 39 Kansas, 105; Atchison T. S. H. *v.* Watson, 37 Kansas, 773. The fact being undisputed the court should instruct the jury that there was or was not probable cause. (Brewer *v.* Jacobs, 22 Fed. R. 217; Castro *v.* De Uriarte, 16 *Id.* 93; Fulton *v.* Onesti, 66 Cal. 575; Alan *v.* Parke, 5 Hawaiin Rep. 2; Achu *v.* Wongkuai, 3 *Id.* 81.) And direct a verdict accordingly. (Besson *v.* Southard, 10 N. Y. 236.)

facts of the particular case.[1] The existence of reasonable and probable cause is a mixed proposition of law and fact,[2] sometimes to be decided by the court alone, and sometimes by the jury under the instructions of the court.[3] It is frequently difficult duly to apportion the duty of the court and of the jury. The leading rule is: "Where the circumstances relied on as evidence of probable cause are admitted by the pleadings, it belongs to the court to pronounce upon them; and where these circumstances are clearly established by uncontroverted testimony, or by the concession of the parties, *and they* [the circumstances] *fully establish a probable cause*, the court may refuse to submit the cause to the jury, and order the plaintiff to be nonsuited."[4] The rule as thus laid down has been generally approved of, and it has been remarked: "This rule adhered to will prevent a confounding of the duties of courts and of juries in actions of this character."[5] Conceding this, still there is a difficulty in the application of the rule, and the difficulty is this: What are the facts

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[1] Lyon *v.* Browne, 8 Vict. Law Rep. L. 247.

[2] Johnstone *v.* Sutton, 1 T. R. 545; Ravenga *v.* Macintosh, 4 D. & R. 107; Wheeler *v.* Nesbitt, 24 How. U. S. Rep. 544; Blunt *v.* Little, 3 Mason, 102; Munns *v.* Dupont, 3 Wash. C. C. 31; see So. West. R. R. Co. *v.* Mitchell, 5 So. East. Rep. 490 (Ga.), and note thereto; McNulty *v.* Walker, 1 So. Rep. 55 (Miss.); Coleman *v.* Allen, 5 So. East. Rep, 205, note.

[3] At the close of plaintiff's case the judge asked the jury, against the protest of defendant's counsel, if they believed defendant acted with malice; and, contrary to his expectation, they answered yes. The judge refused to rule whether there was reasonable and probable cause. On the conclusion of the case, the jury found that defendant had acted with malice and without probable cause, and gave plaintiff a verdict. Held, the question of reasonable and probable cause is for the judge; yet where defendant was found by the jury not to have acted *bona fide*, the question of reasonable and probable cause cannot be ruled in his favor. Reasonable and probable cause in the mind of the judge is not sufficient, there must have been reasonable and probable cause moving defendant; also held no error to submit the question of malice at the close of plaintiff's case. (Shrosbery *v.* Osmaston, 37 Law Times, N. S. 792.)

[4] By Marcy, J., Masten *v.* Deyo, 2 Wend. 424; and see Burns *v.* Erben, 40 N. Y. 463; Besson *v.* Southard, 10 *Id.* 236; Davis *v.* Hardy, 6 Barn. & C. 225; 9 D. & R. 380; see Burton *v.* St. Paul, M. & M. R. R. 33 Minn. 189. Error to submit question of probable cause to jury even by implication. (Bulkeley *v.* Smith, 2 Duer, 261.)

[5] Heyne *v.* Blair, 62 N. Y. 23.

which "fully establish a probable cause?"[1] Thus, where the defendant had discounted for the plaintiff two notes of $300 each, both purporting to be indorsed by A., subsequently the defendant, doubting if the indorsements were those of A., showed the indorsements to the cashier and teller of A.'s banker, who both doubted the genuineness of the signatures indorsed. At defendant's request the said cashier inquired of A. what notes he had indorsed for the plaintiff. A. answered two only, one for $300 and the other for $150. Upon this being communicated to the defendant, he had the plaintiff arrested on a charge of forgery, when the indorsements proved to be genuine. In an action by the plaintiff for malicious prosecution, the facts were uncontroverted, and the judge directed a verdict for the defendant, on the ground that there was reasonable and probable cause for the arrest. The general term upheld the action of the judge, but the Court of Appeals reversed the judgment, upon the grounds that "the evidence did not conclusively establish a probable cause, and that the evidence tended to show a want of such cause;" and further that it ought to have been left to the jury "to determine the effect which all the information and knowledge in the defendant's possession would have had upon the mind of a man of ordinary prudence and caution, acting conscientiously, that is, the belief which the defendant might have honestly entertained from these and all the other circumstances of the case." The prevailing opinion of the court in the case now under consideration further states: "It is pre-

[1] Although the question of reasonable and probable cause is an inference to be drawn by the judge from facts undisputed, yet the test is not what impression the circumstances would make on the mind of a lawyer, but whether the circumstances warranted a discreet man in instituting the proceedings. (Kelly *v.* Midland G't West. R'way of Ireland Co. 7 Ir. R. C. L. 8.) Instances of want of probable cause. (See Ayres *v.* Elbrough, 22 Law Times, N. S. 106; Krulevitz *v.* East. R. R. Co. 140 Mass. 573; 143 Mass. 231; Wans *v.* Stephens, 24 N. Y. St. Rep. 695; Young *v.* Lyall, 5 N. Y. Supp. 11.)

eminently a question for the judgment of twelve men to determine what, upon a doubtful state of facts, *or upon facts from which different men would draw different conclusions—that is, upon facts capable of different inferences*—would be the belief and action of men of ordinary caution and prudence."[1] Good faith alone, without probable cause, is not a defense.[2] We have seen to what extent the belief of the prosecutor affects the question of probable cause (§ 428), and as the belief of the prosecutor may be directly proved,[3] the conclusion at which we arrive is that to authorize the court, in determining the question of the existence of probable cause, the admitted or uncontroverted facts must include the fact of the defendant's belief. The rule of law on this point, as laid down by the American courts, appears to be far more intelligible than is the rule propounded by the English courts. Thus, in a leading case in the House of Lords,[4] it was said by Lord Chelmsford; "No definite rule can be

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[1] Heyne *v.* Blair, 62 N. Y. 19; rev'g s. c. 3 Sup. Ct. Rep. (T. & C.) 264. In an action against a defendant for taking the plaintiff to a police office, and causing him to be imprisoned without reasonable or probable cause, on a charge that he uttered menaces against the defendant's life—held that it was not for the judge alone to determine whether the menaces justified the charge, but that it should have been left to the jury to determine whether the defendant believed the menaces, before the judge decided whether or not there was reasonable and probable cause for the charge. (Venafra *v.* Johnson, 3 M. & Scott, 847; 10 Bing. 301; 6 C. & P. 50.) In Haupt *v.* Pohlmann (1 Robertson, 126), held proper to instruct the jury that they were to determine from all the facts in the case whether there was probable cause. (Acker *v.* Gundy, 11 Cent. Rep. 618 [Pa.].)

One S. daubed defendant's fence with paint, and told defendant's wife it had been done by plaintiff; afterwards S. told defendant the daubing was done by him, S., and agreed with defendant to settle the matter by repainting the fence and paying $5. After this defendant had plaintiff arrested for malicious mischief, upon which charge she was tried and acquitted. Plaintiff sued for malicious prosecution, and was nonsuited—held error; that it should have been left to the jury to say whether defendant, when he made the charge against plaintiff, actually credited S.'s first statement, and commenced the prosecution in good faith. (Foote *v.* Milbier, 1 Sup. Ct. Rep. [T. & C.] 456.)

[2] Wilson *v.* Bowen, 64 Mich. 133.

[3] McKown *v.* Hunter, 30 N. Y. 628; Dillon *v.* Anderson, 43 N. Y. 236; Goodman *v.* Stroheim, 36 Superior Ct. R. (4 Jones & S.) 216; *ante*, note, § 402.

[4] Lister *v.* Perryman, Law Rep. 4 Ho. Lds. App. Cas. 521.

laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury constitute a defense to the action.[1] The verdict, therefore, in cases of this description, is only nominally the verdict of the jury." And by Lord Westbury, in the same case: "The existence of reasonable and probable cause is an inference of fact. It must be derived from all the circumstances of the case. I regret, therefore, to find the law to be that it is an inference to be drawn by the judge, and not by the jury. I think the law ought to be the other way."

§ 430*a*. Where the facts are controverted, or the veracity of witnesses is impeached, the question of probable cause is a mixed one of law and fact, to be determined by the jury, under the instructions of the court.[2] The judge is to instruct the jury what facts will constitute a defense, and the jury are to determine if such facts have or have not been proved, and decide accordingly.[3] The question of

[1] Nonsuit held proper. (Kelly *v.* Midland Gt. West. R'way, 7 Ir. Rep. C. L. 8; Fish *v.* Scott, Peake, 135; Brooks *v.* Blair, 39 Law Jour. C. P. 1; Davidson *v.* Smyth, 20 Law Rep. Ir. 326; Hicks *v.* Faulkner, 46 Law Times, N. S. 127; aff'g 8 Q. B. D. 167; Rippon *v.* Dennis, 6 Vict. Law Rep. L. 81; Castro *v.* De Uriarte, 16 Fed. Rep. 93; Dearmond *v.* St. Amant, 40 La. An. 374; Davison *v.* Smyth, 20 L. Rep. Ir. 326; Phillips *v.* Naylor, 4 H. & N. 565; Longden *v.* Weigall, 3 Vict. Law Rep. L. 266.)

[2] Besson *v.* Southard, 10 N. Y. 236; Bell *v.* Matthews, 37 Kansas, 686; Burton *v.* St Paul, M. & M. R. R. Co. 33 Minn. 189.

[3] Bulkeley *v.* Keteltas, 6 N. Y. 384; Fagan *v.* Knox, 1 Abb. N. C. 246; Pangburn *v.* Bull, 1 Wend. 352; Masten *v.* Deyo, 2 Wend. 428; M'Cormick *v.* Sisson, 7 Cow. 715; Hall *v.* Suydam, 6 Barb. 86; Stevens *v.* Lacour, 10 Barb. 62; Harkrader *v.* Moore, 44 Cal. 144; Foshay *v.* Ferguson, 2 Denio, 619; Turner *v.* Ambler, 10 Q. B. 252; Rowlands *v.* Samuel, 11 Q. B. 39; Chapman *v.* Hislop, 18 Jur. 348; Heslop *v.* Chapman, 23 Law Jour. Rep. Q. B. 49. In an action for a malicious prosecution, though in it the question of reasonable or probable cause depends not upon a few and simple facts, but upon facts which are numerous and complicated, and upon numerous and complicated inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, that the same do or do not amount to reasonable and probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. (Panton *v.* Williams, 1 G. & D. 504.) In an action for charging plaintiff with a felony, maliciously and without reasonable or probable cause—held that

existence or want of probable cause is not fairly submitted to the jury, where they are not told what facts they are to consider in determining the question but are left to determine it in the light of all the facts proven.[1] The jury may be asked whether or not the defendant, at the time when he prosecuted, *knew* of the existence of those circumstances which led to show probable cause, or *believed* they amounted to the offense charged; and if they negative either of these facts, the judge will decide there was no probable cause.[2]

§ 431. To sustain the action for malicious prosecution, *malice* and *want of probable cause* must co-exist.[3] Proof

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the judge was warranted in leaving to the jury, instead of deciding himself, the existence of probable cause, upon the following statement of facts: The plaintiff, a servant, being discharged from service on a Friday, took away with her from her master's house a trunk and bag, the property of her master. The master wrote to her the next day demanding his property, and threatening to proceed criminally on the Monday following, if it was not restored; the servant being absent from home when the letter was delivered, no answer was returned; whereupon the master the same day, Saturday, had her taken in custody; but, when she was brought before the magistrates on Monday, declined to make any charge. (M'Donald *v.* Rooke, 2 Bing. N. C. 217; 2 Scott, 359; 1 Hodges, 314.)

[1] Sweeney *v.* Perney, 40 Kansas, 102; Atchison, &c. *v.* Watson, 37 Kansas, 773. It is for the jury to determine what facts are proved, and for the court to say whether or not such facts amount to probable cause. Moore *v.* No. Pac. R. R. Co. 37 Minn. 147; Burton *v.* St. Paul, M. & M. Co. 33 Minn. 189; Johnson *v.* Miller, 63 Iowa, 530; Ross *v.* Langworthy, 13 Neb. 492; Castro *v.* De-Uriarte, 16 Fed. Rep. 93; Gee *v.* Culver, 12 Oregon, 228; Sartwell *v.* Parker, 141 Mass. 405; McNulty *v.* Walker, 64 Miss. 198. When the evidence as to probable cause is conflicting, the court is not required to state the evidence which if true would establish a want of probable cause, and instruct that if such evidence is believed, there was not probable cause, or to state that which, if true, would establish probable cause. (Gulf, C. & S. F. Railway Co. *v.* James, 10 So. West. Rep. 744 [Texas].)

[2] McWilliams *v.* Hoban, 42 Md. 56.

[3] Besson *v.* Southard, 10 N. Y. 236; Rhodes *v.* Brandt, 21 Hun, 1; Kingsbury *v.* Garden, 45 N. Y. Superior Co't, 224; Richardson *v.* Virtue, 2 Hun, 208; Castro *v.* De Uriarte, 16 Fed. Rep. 93; McCormack *v.* Perry, 14 N. Y. St. Rep. 154; 47 Hun, 71; Livingston *v.* Hardie, 6 So. Rep. 129 [La.]; Fagan *v.* Knox, 1 Abb. N. C. 246; s. c. Fagnan *v.* Knox, 66 N. Y. 528; Metcalfe *v.* Brooklyn Life Ins. Co. 45 Md. 198; Lillard *v.* Carter, Sup. Ct. Tenn. Feb. 1876; 1 Law & Eq. Rep. 539; Byne *v.* Moore, 1 C. Marsh. 12; 5 Taunt. 187; Farmer *v.* Darling, 4 Burr. 1971; Zantzinger *v.* Weightman, 2 Cranch C. C. 478; Breckenridge *v.* Auld, 4 *Id.* 731; Acc. Transit Co. *v.* McCerren, 13 La. An. 214; Pellenz *v.* Bullerdieck, *Id.* 274; Potter *v.* Seale, 8 Cal. 217; Vanderbilt *v.* Mathis, 5 Duer, 304; Murray *v.*

that the prosecution was malicious will not sustain the action, unless it also appear there was a want of probable cause.[1] To prove that prosecution was without probable cause, plaintiff may show his good reputation, known to defendant when the prosecution was commenced.[2] Showing the want of reasonable and probable cause, does not, *per se*, and as a conclusion of law, prove malice,[3] but the want of reasonable and probable cause is a circumstance which the jury may and should consider in determining the motive of the prosecution.[4] The absence of reasonable and probable cause is at least a link in the chain of evidence of an improper or malicious motive in the prosecutor, and one dictum has gone so far as to declare that "malice is inferred from want of probable cause. . . .

McLane, 5 Hall L. J. 514: Blunt *v.* Little, 3 Mason, 102; Richardson *v.* Virtue, 2 Hun, 208; Munns *v.* Dupont, 3 Wash. Cir. Ct. 31; Harpham *v.* Whitney, 77 Ill. 32; Porter *v.* White, 4 Central Reporter, 151; Green *v.* Cochran, 43 Iowa, 544, and many more.

[1] Wheeler *v.* Nesbitt, 24 How. U. S. Rep. 544.

[2] McIntire *v.* Levering, 20 No. East. Rep. 191 (Mass.).

[3] Malice not necessarily inferred from want of probable cause. There may be want of probable cause and no malice. (Harkrader *v.* Moore, 44 Cal. 144; Harpham *v.* Whitney, 77 Ill. 32.) Probable cause is not a defense to an action for having signed an order for plaintiff's removal to a lunatic asylum, and for the libel contained in such order. (Carr *v.* Torre, 54 Law Times, N. S. 516; rev'g *Id.* 87; and see Ayres *v.* Russell, 50 Hun, 283; Lockenour *v.* Sides, 57 Ind. 360.)

The inference is not of law but of fact, which the jury is not bound to draw (Mitchell *v.* Jenkins, 2 Nev. & M. 301; 5 B. & Adol. 588), and charging the jury that the absence of probable cause is *conclusive* of *legal* malice, held a misdirection. (*Id.*) There is a material distinction between the institution of the prosecution and its continuance after it has been already instituted without authority by an agent. And the absence of reasonable and probable cause, which might be evidence of malice in the one case, will not be so in the other. (Weston *v.* Beeman, 27 Law Jour. Rep. Ex. 57.)

[4] Malice may be implied from the want of probable cause. (Hall *v.* Suydam, 6 Barb. 83; Murray *v.* McLane, 5 Hall Law Jour. 514; Wheeler *v.* Nesbitt, 24 How. U. S. 544; Blunt *v.* Little, 3 Mason, 102; Wiggin *v.* Coffin, 3 Story, 1; Wilmarth *v.* Montford, 4 Wash. C. C. 79; Warner *v.* Bruen, 4 City Hall Rec. 92; Burhans *v.* Sanford, 19 Wend. 417; Garrison *v.* Pearce, 3 E. D. Smith, 255; Crawford *v.* Ryan, 7 Atl. Rep. 745 [Pa.]; Bartlett *v.* Hawley, 38 Minn. 308; Wertheim *v.* Altschuler, 12 Neb. 591; Edgworth *v.* Carson, 43 Mich. 241; Heap *v.* Parrish, 104 Ind. 36; Blunk *v.* Atchison, T. & S. F. R. Co. 38 Fed. Rep. 311; Murphy *v.* Hobbs, 8 Colorado, 17.) The court should not instruct the jury that they may infer malice from want of probable cause, as such a charge might give the jury the impression that the judge believed want of probable cause had been shown. (Biering *v.* First Nat'l Bank of Galveston, 69 Texas, 599.)

A case of want of probable cause without malice would be *felo de se.* The thing is impossible."[1] But it is settled in New York that the want of probable cause must be shown as an independent fact, and cannot be inferred from any degree of malice.[2] The termination of the proceedings in favor of the plaintiff is not alone a presumption of malice,[3] but it is evidence of malice that the defendant circulated reports prejudical to the plaintiff,[4] or published an advertisement of the finding of the indictment,[5] or had misstated the facts and exhibited anger,[6] or that defendant resorted to criminal proceedings to collect a debt.[7] It is admissible to ask the defendant as a witness on his own behalf, whether, in procuring the warrant for plaintiff's arrest, he acted without malice.[8] The existence or absence of malice is a question for the jury.[9] Evidence of malice may be rebutted by proof of *bona fides.*[10] The want of probable cause is not malice itself but only evidence of malice. It has not the force of a legal conclusion, and therefore the

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[1] Mullen, J., Lawyer *v.* Loomis, 3 Sup. Ct. Rep. (T. & C.) 393.

[2] Besson *v.* Southard, 10 N. Y. 236.

[3] Boeger *v.* Langenberg, 11 So. West. Rep. 223 (Mo.); Thompson *v.* Beacon Valley Rubber Co. 56 Conn. 493; Johnson *v.* Chambers, 10 Ired. 287; Ullman *v.* Abrams, 9 Bush (Ky.), 738. Offer of compromise not evidence of malice. (Emmerson *v.* Cochran, 111 Pa. St. 619.)

[4] Zantzinger *v.* Weightman, 2 Cranch C. C. 478; Brockleman *v.* Brandt, 10 Abb. Pr. R. 141; Caddy *v.* Barlow, 1 Man. & R. 275.

[5] Chambers *v.* Robinson, 2 Str. 691.

[6] Stewart *v.* Beaumont, 4 Fost. & F. 1034.

[7] Gallaway *v.* Burr, 32 Mich. 332; Ross *v.* Langworthy, 13 Neb. 492

[8] McCormack *v.* Perry, 47 Hun, 71; 14 N. Y. St. Rep. 154, disregarding to the contrary. See in note to § 402, *ante;* Lawyer *v.* Loomis, 3 Sup. Ct. Rep. (T. & C.) 393.

[9] Wheeler *v.* Nesbitt, 24 How. U. S. Rep. 545; Munns *v.* Dupont, 3 Wash. C. C. 31; Payne *v.* Revans, 9 Weekly Rep. 693; S. C. at *Nisi Prius*, Payne *v.* Revons, 2 Fost. & F. 367; Bulkeley *v.* Smith, 2 Duer, 271; Laird *v.* Taylor, 66 Barb. 142; Miller *v.* Milligan, 48 Barb. 30. Where all men would not draw an inference of malice, it is a question for the jury, and it is error to charge that as matter of law there was no reasonable cause for procuring the arrest. (Neill *v.* Thorn, 17 Hun, 144; and see Gale *v.* Bohanan, 73 Iowa, 511.)

Mere dislike or ill-will towards one by another does not constitute malice in the legal sense. There must be some act done by defendant with intent to injure plaintiff, and such act must be wrongful and done without legal justification or excuse. (Peck *v.* Chouteau, 91 Mo. 138; Glasgow *v.* Owen, 69 Texas, 167.)

[10] Wheeler *v.* Nesbitt, 24 How. U. S. Rep. 545; Wilmarth *v.* Mountford, 4 Wash. C. C. 79; Lawyer *v.* Loomis, 3 Sup. Ct. Rep. (T. & C.) 393.

existence of malice is a fact to be found by the jury. Defendant may testify as to his motive in making the complaint.[1] It is true there are certain things which, if proved, the law declares to be conclusive evidence of malice; but mere want of probable cause is not one of them. If a prosecution be instituted to harass an opponent in a civil action,[2] or for the purpose of extorting money or other property, the law implies malice, and if, in this case, the prosecution . . . was . . . to obtain title to the horse alleged to have been stolen, that fact was conclusive evidence of malice.[3] To prosecute for the sake of making an example of the offender is not indicative of malice.[4] In an action for maliciously indicting plaintiff, for cattle stealing, it appeared that plaintiff, who was driving his cattle to market, had, on passing defendant's farm, received into his drove two of defendant's cattle, and had proceeded on his journey with them seventy miles, when he was overtaken by defendant who charged him with the theft, and plaintiff paid defendant a large sum of money to settle the affair. Defendant was informed that plaintiff had in like manner driven off other cattle; held the action could not be maintained, although it was shown the prosecution was malicious, and plaintiff on trial had been acquitted.[5] The defendant, the owner of a fishing boat, on going to look for it on several occasions, found that it had been taken from its mooring. It was brought back, however, once with a net, another time with a net and some sea filth left in it. The third

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[1] Sherburne *v.* Rodman, 51 Wis. 474; White *v.* Beck, 64 Iowa, 122; Heap *v.* Parrish, 104 Ind. 136; Garrett *v.* Mannheimer, 24 Minn. 193; McKown *v.* Hunter, 30 N. Y. 625; Burkey *v.* Judd, 22 Minn. 287; McCormack *v.* Perry, 47 Hun, 71; 14 N. Y. St. Rep. 154; see *ante*, note 1, page 661.

[2] McElroy *v.* Meredith, 11 Cent. Rep. 152; Prough *v.* Entriken, 11 Penn. St. R. 82; Schofield *v.* Ferrers, 47 *Id.* 196; Colson *v.* Radcliffe, 4 Times Law Rep. 60.

[3] Schofield *v.* Ferrers, 47 Penn. St. R. 196.

[4] Coleman *v.* Allen, 79 Ga. 637.

[5] Foshay *v.* Ferguson, 2 Denio, 617.

time the boat was taken, defendant caused plaintiff to be arrested for grand larceny. In an action by plaintiff for malicious prosecution, held there was an entire want of reasonable ground for believing the party guilty of that crime, and that malice might be inferred from such want of probable cause.[1] The plaintiff had left his wife with her father, and gone, as he alleged, in search of work. Defendant, the brother of plaintiff's wife, at her request, and with her father's consent (the latter being unable to support his daughter), procured plaintiff's arrest for deserting his wife. Prior to any hearing, defendant took plaintiff's wife to the overseer and obtained some relief, and she was taken to the workhouse. There was some evidence that this proceeding was colorable, and done to support the charge of desertion. The charge was dismissed, whereupon plaintiff sued for malicious prosecution, held that the judge properly instructed the jury that there was no reasonable or probable cause for the prosecution; and although defendant acted under a mistake, the jury might infer malice from the fact of defendant's proceedings to make a colorable chargeability.[2]

§ 431*a*. Plaintiff, a surgeon, was prosecuted by defendant for conspiracy (defrauding the defendant in an accident case). The directors of the company on receiving the information, caused statements to be taken by a solicitor with reference to plaintiff's connection with the alleged conspiracy, and were advised by counsel that there was good ground for prosecuting plaintiff. Plaintiff was acquitted and brought this action. The judge directed the jury to find whether defendants had taken reasonable care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the magistrates; the jury answered in the affirma-

[1] Wanser *v.* Wyckoff, 16 Sup. Rep. (9 Hun), 178.

[2] Heath *v.* Heape, 1 Hurl. & N. 478.

tive, and the judge entered judgment for defendant. Held, the direction correct.[1]

§ 432. The person liable to be sued is he who institutes the prosecution, or who authorizes it, by previous authority or subsequent ratification.[2] The defendant's son, aged seventeen, and in defendant's employ, caused plaintiff, also in defendant's employ, to be arrested on a charge of false pretenses. Plaintiff was remanded. After the remand the son told the defendant what he had done. The defendant did not prohibit the son from proceeding further, but said as the son had commenced the proceeding, he, defendant, would not interfere. Held, there was no evidence of either previous authority or subsequent ratification by the defendant, and that he was not liable for the son's act;[3] and where a prosecution is instituted by husband and wife, the latter acting in the presence of and by the direction of the husband, the wife is not lia-

[1] Abrath *v.* The Northeastern Railway Company, 11 Q. B. D. 440; rev'g s. c. *Id.* 79.

[2] *Ante*, § 422*a*. "Plaintiff must show that the defendant, and not somebody else, has prosecuted him, has been the real party in fact who has set on foot and conducted the proceedings against him." (Hogeboom, J., Miller *v.* Milligan, 48 Barb. 37.) "If he were the mere clerk or agent of others, or a *mere witness* in the transaction, he would not hold the character, nor be liable to the penalties, of a malicious prosecutor." (*Id.*) It must appear that the prosecution was instituted by the defendant. (Gorton *v.* De Angelis, 6 Wend. 418; Besson *v.* Southard, 10 N. Y. 236; Wheeler *v.* Nesbitt, 24 How. U. S. Rep. 544; Clements *v.* Ohrly, 2 Car & K. 686.) Or that he caused it to be instituted. (Casebeer *v.* Drahoble, 13 Neb. 465; see Barrett *v.* Chouteau, 94 Mo. 13; and as to an attorney's liability, Peck *v.* Chouteau, 91 Mo. 138.) A partner is not liable for the false arrest of a debtor which he neither directs, participates in, nor receives any benefit from. (Rosinkrans *v.* Barker, 115 Ill. 331; and see Johnson *v.* Miller, 63 Iowa, 529.) The fact that defendant signed a charge sheet, and appeared before the magistrate, is strong, though not conclusive evidence that he authorized the arrest. (Harris *v.* Dignum, 29 Law Jour. Ex. 23.) One who seeing a man in custody for a supposed offense points out another as the real criminal, and does not direct the officer to take that other into custody, is not liable. (Gosden *v.* Elfick, 4 Exch. 445.) "It sometimes becomes a point of very subtle evidence to determine who was the prosecutor. . . . It is a question to be ascertained [answered] by inquiry and evidence." (Ellenborough, D. J., Rex *v.* Commerell, 4 M. & Sel. 207; see Rowe *v.* London Piano Forte Co. 34 Law Times Rep. N. S. 450.

[3] Moon *v.* Towers, 8 C. B. N. S. 611. Held, an infant is not liable for a suit maliciously prosecuted in his name by his guardian. (Burnham *v.* Seaverns, 101 Mass. 360.)

ble.[1] An employer is not liable for an arrest made by a police officer upon information furnished by a clerk of such employer, without authority from the employer.[2] One is not relieved from his liability as prosecutor because bound over to prosecute;[3] and where the plaintiff and defendant were witnesses in an action, and in consequence of the false swearing of the defendant, the presiding judge ordered the prosecution of the plaintiff for perjury, and bound over the defendant to prosecute, and defendant accordingly appeared before the grand jury and repeated his false swearing, he was held liable to an action.[4] Defendant having lost some horse clippers from his stables sent for a police constable and said to him: "I have had two pairs of clippers stolen from me, and they were last seen in the possession of Danby (plaintiff)," upon this the constable having made inquiries and without communicating with defendant, arrested plaintiff who was taken before the magistrate and committed for trial. Held, defendant was not the prosecutor, and not liable.[5] All who voluntarily participate in the prosecution are liable;[6] and where there are two or more prosecutors, the action may be against one or some, or all of them.[7] A complaint against several

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[1] Cassin *v.* Delany, 38 N. Y. 178; rev'g S. C. 1 Daly, 224.

[2] Hershey *v.* O'Neill, 36 Fed. Rep. 168.

[3] Dubois *v.* Keats, 11 Adol. & El. 329; 4 Jur. 148; Davis *v.* Noak, 1 Stark. Rep. 377.

[4] Fitzjohn *v.* Mackinder, 9 C. B. N. S. 505; rev'g S. C. 8 C. B. N. S. 78.

[5] Danby *v.* Beardsley, 43 Law Times, N. S. 603.

[6] Stansbury *v.* Fogle, 37 Md. 369. Mr. Justice Lopes, in Danby *v.* Beardsley, 43 Law Times Rep. N. S. 603, defines a prosecutor as "a man actively instrumental in putting the criminal law in force." It is not prosecution to write a letter to a superintendent of police, stating that plaintiff had committed a murder, in consequence of which the police attempted to arrest plaintiff. (Harris *v.* Warre, L. R. 4 C. P. D. 125.)

[7] Stroud *v.* Roper, 1 Bulst. 15; Pencavin *v.* Trapping, Latch, 262; Thomas *v.* Rumsey, 6 Johns. 27; Patten *v.* Gurney, 17 Mass. 182; Barratt *v.* Collins, 10 Moore, 446; Walser *v.* Thies, 56 Mo. 89; Lows *v.* Telford, 1 App. Cas. 514; 35 Law Times Rep. N. S. 69. In an action for malicious prosecution against A. & B., it appeared that both entered into a joint recognizance to prosecute and give evidence, but only A. employed the attorney, and B. attended and gave evidence at the request of such attorney; held, B. was not liable. (Eagar *v.* Dyott, 5 Car. & P. 4.)

defendants for malicious prosecution, need not allege that they conspired together to commit the injury, the damage is the gist of the action and not the conspiracy.[1]

It seems there cannot be a joint action by two or more for a malicious prosecution.[2]

An action for malicious prosecution may be maintained against a corporation.[3]

§ 433. The complaint should allege the existence of facts constituting a cause of action (§ 321).[4] The fact of the prosecution is to be alleged according to circumstances, as whether by indictment or otherwise. The complaint need not allege jurisdiction in the court.[5] Unless where the action is founded upon a false charge upon which no further proceeding was had, it is not necessary to state the language of the charge; it is sufficient to state its substance or effect.[6] A declaration which alleges that defend-

[1] Jenner *v.* Carson, 111 Ind. 522.

[2] Lows *v.* Telford, Law Rep. 1 App. Cas. 414.

[3] *Ante*, § 261; Hussey *v.* King, 98 No. Car. 34; Jordan *v.* Alabama, &c. R. R. 49 Am. Rep. 800; West. News Co. *v.* Wilmarth, 33 Kansas, 510; Goff *v.* G't North. R'way Co. 3 El. & El. 672; Edwards *v.* Midland R'way Co. L. R. 6 Q. B. D. 287; Henderson *v.* Midland R'way Co. 20 Week. Rep. 23. The case of Stevens *v.* Midland R'way Co. (10 Ex. 352), not followed. The corporation is jointly and severally liable with its servants and agents for the acts of such servants and agents within their authority or subsequently ratified. (Gulf, C. & S. F. R'way Co. *v.* James. 10 So. West. Rep. 744; Turner *v.* Phœnix Ins. Co. 55 Mich. 236; Hussey *v.* Norfolk So. R'way Co. 98 No. Car 34.) It cannot be inferred that an acting manager of a corporation has, by reason of his position, authority to direct a prosecution. (B'k of New South Wales *v.* Owston, 4 App. Cas. 270.) Directors instructed their solicitor to take steps against their manager for the recovery of their books. He prosecuted the manager for stealing them. Held, that as the directors had not protested against nor repudiated the criminal proceedings, they were liable. (Lennox *v.* Langdon, 3 Austral. Jurist Rep. 25; see Thurling *v.* No. Cornish Co. *Id.;* 3 Vict. Law Rep. L. 236.) Individual members of a voluntary association, the object of which is to bring thieves to justice, are not liable to a person whose prosecution was caused by the association, although they voted for it and contributed money, unless in doing so they acted with malice and without probable cause. (Johnson *v.* Miller, 63 Iowa, 529.)

[4] A count alleging that defendant caused plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a count for an assault and false imprisonment, and not for a malicious prosecution. (Brandt *v.* Craddock, 26 L. J. Ex. 315.)

[5] Goslin *v.* Wilcock, 2 Wils. 302.

[6] Blizard *v.* Kelly, 2 B. & C. 283; Morris *v.* Scott, 21 Wend. 281; Thomas *v.* Hunter, 44 Ind. 477.

ant charged plaintiff with felony is supported by evidence that defendant stated to the magistrate that he had been robbed of certain articles, and suspected and believed that plaintiff had stolen them.[1] But where A., the servant of B., stated before a magistrate that plaintiff came into the yard of defendant (B.) and took from a stable there two geldings, the property of B., and rode them away, after being told he must not do so; held, this did not support a count that "the information charged plaintiff with having feloniously stolen and ridden away with two geldings."[2]

The complaint must also allege the termination of the prosecution;[3] if the plaintiff was acquitted, it should be so alleged.[4] It might be insufficient to allege that the plaintiff was released and discharged from imprisonment.[5] The complaint should also allege that defendant acted without reasonable and probable cause, and maliciously; an allegation that the charge was false and malicious will not dispense with the allegation of want of probable cause.[6] The omission of an allegation of the want of probable cause is cured by verdict.[7]

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[1] Davis *v.* Noake, 6 M. & S. 29.

[2] Milton *v.* Elmore, 4 Car. & P. 456.

[3] Whitworth *v.* Hall, 2 B. & Adol. 695; Mellor *v.* Baddeley, 2 Cro. & M. 675; Barber *v.* Lissiter, 29 Law Jour. Rep. C. P. 161; Carman *v.* Truman, 1 Bro. Parl. Cas. 101; Fisher *v.* Bristow, 1 Doug. 215; Thomason *v.* Demotte, 9 Abb. Pr. Rep. 529; Sutton *v.* Aiken, 51 Mich. 463; Parton *v.* Hill, 10 Law Times, 414; Foster *v.* Orr, 21 Pac. Rep. 440 (Oregon); but see Redway *v.* McAndrew, Law Rep. 9 Q. B. 74. Showing that plaintiff gave bail to answer the complaint, and that the bail were afterwards discharged, does not show the prosecution was terminated. (Bacon *v.* Townsend, 6 Barb. 426.) The determination of the prosecuting officer never to bring the indictment to trial, for the reason that he deems the charge unfounded, is not a sufficient termination of the proceeding. (Thomason *v.* Demotte, 9 Abb. Pr. Rep. 529.)

[4] Acquitted means acquitted by a jury. (Morgan *v.* Hughes, 2 T. R. 231; Hunter *v.* French, Willes, 517; and see Woodford *v.* Ashley, 11 East, 508; Stone *v.* Hutchinson, 4 Hawaiin Rep. 127.)

[5] Morgan *v.* Hughes, 2 T. R. 225. Alleging that grand jury did not find a bill is sufficient. (*Id.*) Any dismissal before trial is sufficient. (Marbourg *v.* Smith, 11 Kan. 554.)

[6] Given *v.* Webb, 7 Robertson, 65; Scotten *v.* Longfellow, 40 Ind. 23; Turner *v.* Turner, 1 Pickle (85 Tenn.), 387. The complaint need not allege that the accusation was false or was falsely made. (Avery *v.* Blair, 21 Week. Dig. 178; rev'd on another point, 105 N. Y. 669)

[7] Weinberger *v.* Shelly, 6 Watts & S. 336; *contra*, Maddox *v.* McGinnis, 7 T. B. Monr. 371; Bishop *v.* Martin, 14 Up. Can. Q. B. Rep. 416.

An averment that plaintiff incurred large expense in obtaining release from imprisonment is a sufficient allegation of special damage to sustain proof of the amount incurred for attorney's fees.[1]

A plaintiff may unite in one complaint causes of action for malicious prosecution and slander or libel,[2] or malicious prosecution and false imprisonment.[3]

§ 434. In an action for malicious prosecution, the plea of not guilty put in issue the probable cause, and therefore, pleas of not guilty and want of probable cause could not be pleaded together.[4] A plea in justification on the ground that the plaintiff was guilty of the offense imputed, must allege that at the time the defendant made the charge, he had been informed of the facts upon which the charge was made.[5]

§ 435. The measure of damages is the expense of the defense, the value of the time, or profit or property lost by plaintiff, and a reasonable compensation for injury to reputation.[6] The jury may properly consider the degree of malignity displayed by the prosecutor,[7] and any acts of

[1] Swart *v.* Kimball, 43 Mich. 443. An allegation that plaintiff's wife became sick and helpless in consequence of the prosecution is too remote. (Hampton *v.* John, 58 Iowa, 317.)

[2] Watts *v.* Hilton, 10 Sup. Ct. Rep. (3 Hun), 606; Watson *v.* Hazzard, 3 Code Rep. 218; Martin *v.* Mattison, 8 Abb. Pr. Rep. 3; Brewer *v.* Temple, 15 How. Pr. Rep. 286; Barr *v.* Shaw, 10 Hun, 580.

[3] Brown *v.* Foster, 1 Hurl. & N. 736; 3 Jur. N. S. 245; Henderson *v.* Jackson, 2 Sweeny, 324; Barr *v.* Shaw, 10 Hun, 580.

[4] Sheehee *v.* Resler, 1 Cr. C. C. 42; Cotton *v.* Brown, 4 Nev. & M. 831; Hounsfield *v.* Drury, 11 Ad. & Ell. 98. In Indiana, where defendant pleaded a general denial and a special answer of probable cause, a demurrer to the latter was sustained. (Trogden *v.* Deckard, 45 Ind. 572.) Not guilty did not put in issue the determination of the prosecution. (Haddrick *v.* Heslop, 12 Q. B. 267; Watkins *v.* Lee, 5 M. & W. 270; Drummond *v.* Pigou, 2 Bing. N. C. 114; Atkinson, *v.* Raleigh, 3 Q. B. 79; Wren *v.* Heslop, 12 Q. B. 267.)

[5] Delegal *v.* Highley, 3 Bing. N. C. 950; and see what is said in Wanser *v.* Wyckoff, 9 Hun, 179; Busst *v.* Gibbons, 30 Law Jour. Rep. Ex. 75.

[6] Blunk *v.* Atchison, 38 Fed. Rep. 311; Wagner *v.* Renk, 65 Wis. 364; Walker *v.* Pitman, 108 Ind. 341; Moffat *v.* Fisher, 47 Iowa, 473. Damages under the Code in Georgia. (Coleman *v.* Allen, 5 So. East. Rep. 205 [Ga.].)

[7] Murphy *v.* Hobbs, 8 Colo. 17.

violence or insult to which plaintiff has been subjected.[1] Punitive damages may be given where the defendant has acted maliciously,[2] and damages should have some relation to defendant's financial ability.[3]

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[1] Hinsworth *v.* Fowkes, 4 B. & Ad. 449. As his treatment while in jail, (Zebley *v.* Storey, 117 Pa. St. Rep. 478.)

[2] Spear *v.* Hiles, 67 Wis. 350.

[3] *Id.;* and see Wilcox *v.* Moon, 17 Atl. Rep. 742 (Vt.); Peck *v.* Small, 35 Minn. 465; Coleman *v.* Allen, 5 So. East. Rep. 205 (Ga.); Stone *v.* Hutchinson, 4 Hawaiin Rep. 117. Where no actual damage is suffered exemplary damages should not be given. (Schippel *v.* Norton, 38 Kansas, 567; and as to damages see note to this case in 16 Pac. Rep. 804.)

APPENDIX.

APPENDIX.

KING'S BENCH, A. D. 1821.

SWADLING *v.* TARPLEY.[1]

Where a servant brings an action for an alleged false character given of him by his late master, the latter is in general privileged, and, to sustain the action, *malice* must be proved, but this may be inferred by the jury from the language used and the circumstances under which the defamatory character is given.

THIS was an action for a libel: the defendant pleaded, 1. The general issue, *not guilty;* and 2. A justification of the truth of the alleged libel, on which issue was joined. At the trial before GARROW, B., at the last assizes for the county of Oxford, a verdict was found for the plaintiff, damages £50.

The case was this:—The plaintiff had been a nursery maid for four years in the family of the defendant, a magistrate and clergyman, residing in the county of Northampton; three months after she quitted the service, a lady, to whom she had hired herself, wrote to the defendant's wife for the plaintiff's character, wishing to know whether she had been found honest, sober, and steady, and equal to undertake plain cooking? To this letter the defendant sent an answer to the following effect:

MADAM,—

Mrs. Tarpley being unwell, she has requested me to answer your letter. *Susan Swadling* lived as nursery maid in my family for more than four years; and I think it my duty to inform you that she is neither honest, sober, nor steady, and that she was turned away for the most gross and improper misconduct. She is a most wicked and profligate woman. It is impossible for me to describe the gross insolence and ingratitude shown by her to *Mrs. Tarpley* and myself. We have undoubted proof of

[1] See *ante*, § 245, note 2, p. 428; and § 399, note 5, p. 658.

her going to the man-servant's bed many nights for months before she left us. One servant who lived with us for many years has left us on her account. I am glad of an opportunity of exposing this woman's character. A more vile wretch does not exist; I know her to be a liar, a great thief, and insolent beyond bearing. She has been guilty of a criminal intrigue with the man-servant, David S———. I wish you to read this letter to her should you see her, and I warn you upon no account to take her into your service. I am, &c.

On the part of the plaintiff, the man-servant alluded to in the letter, and mentioned as the person with whom she had had an improper intercourse, was examined, and he positively denied that any such intercourse had ever taken place between them; and he further said that she was a modest, discreet, and well-behaved young woman. He admitted that she had been dismissed for insolence; but, on his cross-examination, nothing came out to shake his testimony. On the part of the defendant, evidence was offered in support of the justification pleaded. It was proved by other servants in the family that during the six months previous to her being turned away, after the family had gone to bed, she had several times left her own bed-room and gone to that of the man-servant; that she was watched, and next morning seen to come out of his room; that on one occasion one of the servants being disturbed by the crying of a child, she went to the plaintiff's room and found her absent from her bed; and the child continuing to cry, she was seen to return to her own room from that of the man-servant's, in her night-gown, and appeared to the witness to be extremely confused. Upon this part of the case expressions of strong affection for the man were proved to have been uttered by her repeatedly, and going, to a certain extent, to an admission of a criminal *amour* subsisting between them. In addition to this, evidence was offered affecting her character for honesty. It was proved that she had stolen coffee and sugar, the property of her master; and one witness deposed to her having stolen a pair of shoes. Other evidence was offered tending to show that she was a person of depraved habits. On the part of the defendant it was contended: 1. That the letter in question was privileged; 2. That there should have been evidence of express malice to

render it actionable; and 3. That the weight of evidence was in favor of the defendant, and substantially justified him in writing such a letter. The learned judge summed up the whole of the case for the jury, and left it for them to say whether there was anything upon the face of the libel to warrant the conclusion that the defendant was influenced by malicious motives. If they were satisfied that the defendant was actuated by malicious motives, the plaintiff was entitled to a verdict, notwithstanding the privilege which the law threw around a master in giving the character of a servant; and notwithstanding there were some circumstances in the case which, to a certain extent, would justify a strong expression of opinion concerning the plaintiff's character and conduct. The jury found their verdict for the plaintiff, damages £50.

G. Cross now moved for a rule to show cause why the verdict should not be set aside and a new trial granted. He made two points: 1. That to sustain this action, there must be evidence of express malice, for that such a letter is privileged when written honestly, though with heat and intemperance; and 2d. That the verdict was against the weight of evidence.

ABBOTT, C. J.—I am of opinion that in this case there ought to be no rule granted. I should be sorry that any decision in which I took part should have the effect of breaking down or lessening that which I consider to be a very wholesome rule of law, namely, that a character written by a former master to a person instituting an inquiry, with a view to take a dismissed servant into his service, is to be considered as a privileged communication, unless it can be shown in some way that the statement of such character proceeds from a vindictive motive. The master in such cases is privileged in what he does; and, in my mind, it is of the utmost importance to society that he should be so privileged. The error is too often committed on the other side; persons are more apt to conceal the faults of servants, in order that they may not be deprived of another service, than to enlarge and expatiate upon their misconduct in a manner that might be justifiable. If, upon reading this letter, a judge could take upon himself to say that it bore nothing upon the face of it manifesting a vindictive motive, I should think he would have been bound to tell the jury that it was a privileged

communication, and upon the general issue they ought to have found a verdict for the defendant. But I cannot say, upon reading this letter, that I do not see upon the face of it something leading me to suppose there was an improper motive in the mind of the defendant; and if the contents of the letter were such as to make it a point in any reasonable degree doubtful, then that doubt must be submitted as a question of fact to the jury; it must be for them to say, upon the view of the whole case, whether this letter did proceed from vindictive motives, or was founded in that correct and proper motive which the law permits. I think this letter does contain such expressions as were fit for the consideration of the jury upon the question of malice, and the question was so presented to the jury. It was left to them to say, upon the whole of the case, whether or no they thought the defendant was actuated by malicious motives at the time. They have, upon the view of the whole of the evidence, found that he was influenced by such motives; and the credit due to the witnesses was a matter peculiarly for their consideration, and I cannot say that they have come to a wrong conclusion. We are not to take it for granted that the question was not fitly left to them as a question for their consideration. I am of opinion, therefore, that we ought not to disturb this verdict.

Bayley, J.—It appears to me that this question was most properly left to the jury; The point upon the general issue was, whether, at the time the letter was written, there was malice in the mind of the defendant in writing it. He is fully warranted in giving an answer to the questions which are put to him; and, in a temperate manner, stating everything which may have a fair tendency to enable the person to whom the letter is written to exercise a discreet judgment upon the subject. But looking at this letter, it appears to me there is a degree of heat and warmth and particularity in it, which was not called for by the application made for the character of the plaintiff; and that being left for the consideration of the jury, it appears to me to have been the proper point for their determination on the general issue. Upon the other question, whether the facts were true or not, that would depend upon the credit given by the jury to the witnesses. There was conflict-

ing evidence on the one side and the other; there was the evidence of the man-servant on the one hand; and they had the opportunity of hearing his testimony, and seeing the manner in which it was delivered. There were several witnesses certainly on the part of the defendant, and after hearing their testimony, the jury had an opportunity of seeing on which side the balance of truth lay. If it had been suggested to us that the learned judge had been dissatisfied with the conclusion to which the jury came, it would have been right for us to have made some application to him upon the subject; but I do not find that anything of that kind is suggested. Not knowing that there is any dissatisfaction in the mind of the learned judge, we cannot act upon the notion that there is any such dissatisfaction existing.

HOLROYD, J.—In cases of this kind, the proof certainly lies upon the party bringing the action, where the alleged slander, whether by words or in a letter, proceeds in consequence of an application to a master for the character of a dismissed servant to show that there was malice in the mind of the defendant, either by direct evidence, or by some other circumstances from which malice can be collected. In the absence of such proof, the defendant would be either entitled to a verdict or the plaintiff must be non-suited. If that were the case in the present action, the defendant would be entitled to succeed, and the court would grant a new trial. But the letter in this case contained such matter as was sufficient to be left to the jury to say whether the defendant was influenced by malicious motives; and they having drawn a conclusion which appears to me to have been perfectly right, I think we ought not to disturb their verdict.

BEST, J.—I am of the same opinion. This motion is made on two grounds: first, that this letter is privileged; and, second, that the verdict is against the weight of the evidence in the cause. There is no doubt that if a man gives a character of a servant, it is *prima facie* privileged, and the party injured must go on to show that the character was given from motives of malice. The learned judge at the trial very fairly left it to the jury to consider whether this letter was written with a malicious

intention. He also left the whole of the evidence for their consideration. The letter itself imported sufficient matter to raise the question of malice or no malice; in this respect the case of Rogers *v.* Clifton is in point. No doubt the defendant, as a clergyman and magistrate, might be very justly incensed at the proceedings of the plaintiff in the bosom of his own family; but if he exceeded the bounds of discretion in the expression of his opinion, he must be answerable for the consequences.

Rule refused.

KING'S BENCH, A. D. 1822.

KING *v.* TOWNSEND.[1]

A voluntary affidavit made before a justice of the peace, is not a judicial proceeding, and therefore, if such an affidavit contains libelous matter, it is actionable.

To describe a man as an informer in such a publication is libelous.

Where special damage was laid, in that A. B. had *wholly ceased to deal with the plaintiff*, by reason of the libel complained of, and it was proved only that she had not dealt with him to so great an extent as before: *Held*, that this was sufficient evidence of special damage to sustain the declaration.

ACTION for a libel contained in an affidavit voluntarily made by the defendant, before a magistrate, imputing to the plaintiff that he had given information to the commissioners of customs, that one *Decima Barber*, a milliner, was possessed of certain uncustomed goods, which were in fact seized, whereby the plaintiff, who carried on the business of a silk mercer, sustained special damage, by reason that the said *Decima Barber wholly ceased to deal* with the said plaintiff in consequence of such slander. Plea, *not guilty*, and issue joined.

After proof was given of the publication of the libel, Mrs. *Decima Barber* was called to prove the special damage. She deposed that previous to the publication of this libel she had dealt almost entirely with the plaintiff, for such articles of silk as she required in her business; but that since the publication,

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[1] See Barber *v.* St. Louis Dispatch Co. 3 Cent. L. J. 360; and *ante*, note 1, p. 335; note 1, p. 583.

believing that the plaintiff had been the person who caused information to be given against her to the customs, she had ceased to deal with him to so large an extent as formerly. She still dealt with him, but not so largely as before the publication.

ABBOTT, Ch. J.—I am of opinion that this action is maintainable. *First*, I think this affidavit is not a judicial proceeding, for it is the mere voluntary affidavit of the defendant; and if such an affidavit were to be considered as a judicial proceeding, and therefore privileged, it would afford a very easy recipe for a libeler to traduce the characters of the most innocent persons. *Second*, I think that to designate a man as an informer, in a publication like this, if done maliciously (which is for the jury), it is libelous in a very offensive degree, and may be the subject of an action. And, *Third*, I have no doubt that proof of Mrs. *Decima Barber* having ceased to deal with the plaintiff to any extent, *in consequence* of the publication of this libel, will be sufficient proof of special damage to sustain this declaration; and it is for the jury to say what damages they will give under the circumstances of the case.

The jury found for the plaintiff, damages £20.

Chitty, in Hilary term, moved to arrest the judgment on the same ground, but the court refused the rule.

SITTINGS IN MIDDLESEX, A. D. 1822.

FOOTE *v.* ROWLEY.[1]

Declaration for words imputing that the plaintiff had murdered his *infant daughter*, means his *legitimate daughter*, and it appearing that the daughter of and concerning whom the words were spoken was an *illegitimate* child of the plaintiff: *Held*, that the declaration was ill.

Sed qu. **As the words were spoken by an apothecary who had attended the child in the small-pox, were they actionable, it not appearing that they were meant in a criminal sense?**

THIS was an action for defamatory words, imputing to the plaintiff that he had murdered his infant daughter. Plea, *not*

[1] See *ante*, note 6, p. 617.

guilty, and issue thereon. The words set out were, "You have murdered your little girl." "This child is murdered." "He has murdered his daughter."

The plaintiff had lost his child in the small-pox; the defendant, a surgeon and apothecary, had attended the child during her illness, and it was alleged that the defendant had said of the plaintiff, of and concerning the child, *that he had murdered his daughter, &c.* It appeared in evidence that the daughter was not born in wedlock, although the plaintiff was a married man. The declaration described the child generally as being "*the infant daughter of the said plaintiff.*"

Scarlett, for the defendant, objected that the plaintiff must be nonsuited. The child was stated in the declaration to be the infant *daughter* of the plaintiff; now the presumption of law was that the child was born in wedlock; but the fact was otherwise, and that fact should have been stated in the declaration. Supposing the words themselves were actionable, the illegitimacy of the daughter would have been no objection; but the illegitimacy ought to have been averred.

Gurney and *Long, contra*, endeavored to answer the objection; *sed per:*

ABBOTT, Ch. J.—This is a fatal objection. The fact of the illegitimacy ought to have been stated. In the declaration the child is described as the plaintiff's infant daughter; now that imports his legitimate daughter, but the fact is not so. The words might have been set out with a *colloquium* of and concerning "a certain *illegitimate child* of the said plaintiff." There must therefore be a nonsuit. But I do not intimate that the plaintiff may bring another action and avoid this objection; for then the question would be, in what sense these words were used? Unless they were used by the defendant in a criminal sense, they would not be actionable.

Nonsuited.

KING'S BENCH, A. D. 1822.

MARTINERE *v.* MACKAY ET UX.[1]

Saying of the plaintiff and one P. S., "I dare say they have got some of the silver spoons in their pockets," is not actionable without an innuendo showing that the words import a felonious stealing.

Where some counts in a declaration are good and some bad in law, and general damages are given, the court will arrest the judgment *in toto*. *Sed quære*, whether a *venire de novo* may not be awarded on payment of costs.

THIS was an action for words of slander, imputing to the plaintiff that she had been guilty of theft. The declaration contained a great many counts. At the trial before HOLROYD, J., at the Westminster sittings after last Trinity term, A. D. 1822, a verdict was found for the plaintiff on the whole declaration, with £50 damages. In Michaelmas term a rule *nisi* was obtained for arresting the judgment, on the ground that the eleventh count did not allege any actionable words, and the damages found by the jury being on the whole declaration, the judgment could not be entered up.

ABBOTT, Ch. J.—I am clearly of opinion that the eleventh count of this declaration is bad, and that the judgment must be arrested. It cannot be said, that because there is a general allegation in the first count, "*that the defendant maliciously intending to have it believed that the plaintiff was a thief*," that will make words afterwards introduced into other counts actionable, which are not actionable of themselves; or can be prayed in aid of other counts which are clearly defective. The words themselves must reasonably import a charge concerning some matter or thing which will subject the party accused to punishment. I cannot say that these words convey an allegation that the spoons had been stolen by the plaintiff. The allegation is that the defendant, speaking of certain spoons belonging to her, said, "I dare say the plaintiff has some of them in her pocket." Now, she might have them in her pocket consistently with perfect innocence; and it is impossible to say that these words of

[1] See *ante*, note 8, p. 185.

themselves are actionable. Then as to the *venire de novo*, I am not clear that we can grant such an application as a matter of course. If it is granted, it must be on payment of costs, and the plaintiff will consider whether she will take a *venire* subject to such conditions, and liable to the consequences which may possibly follow upon a writ of error.

BAYLEY, J.—I am of opinion that this judgment must be arrested. My difficulty in awarding a *venire de novo* is, that it may be error on the record, and that would be subjecting the plaintiff to a great deal of unnecessary expense. Besides, I do not see how a new jury are to be restrained in giving damages upon the other counts beyond what the former jury have given, and that would be exposing the defendant to consequences which the justice of the case may not require.

The rest of the court concurred in the same opinion.

Rule absolute for arresting the judgment.

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